STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals, Zahra, P.J., Neff and Cooper, JJ.

46TH CIRCUIT TRIAL COURT,
Plaintiff-Counter-Defendant-
Third Party Plaintiff-Appellee,

Supreme Court Docket No. 128878
Court of Appeals Docket No. 254179
46th Circuit Court (Crawford) No. 02-005951-CZ

v

CRAWFORD COUNTY and CRAWFORD COUNTY BOARD OF COMMISSIONERS,
Defendants-Counter-Plaintiffs-
Third Party Plaintiffs-Appellants,

and
KALKASKA COUNTY,
Intervening Defendant-Counter-Plaintiff-
Third Party Plaintiff-Appellant,

v
OTSEGO COUNTY,
Third-Party Defendant
/

BRIEF ON APPEAL—APPELLANTS

ORAL ARGUMENT REQUESTED

Respectfully submitted by:

ALLAN FALK, P.C.
By: Allan Falk (P13278)
Lead Counsel for Crawford and Kalkaska
2010 Cimarron Dr.
Okemos, Michigan 48864
(517) 381-8449

COHL, STOKER, TOSKEY & MCGLINCHEY, P.C.
By: Bonnie G. Toskey (P30601)
Counsel for Crawford and Kalkaska
601 N. Capitol Ave.
Lansing, MI 48933
(517) 372-9000

TABLE OF CONTENTS

Attachments

Attachment 1 Consumer Price Index, 2002, US Bureau of Labor Statistics, reprinted from www.bls.gov/cpi/cpid02av.pdf

Attachment 2 *Mitchell v City of Benton Harbor* (Mich App No 244508, Feb. 12, 2004)

Attachment 3 *EJS Properties, LLC v Ferguson* (Mich App No 242490, Feb. 12, 2004)

Attachment 4 Progress Report No. 15: Michigan Court of Appeals Delay Reduction Plan (Jan. 30, 2006)

Attachment 5 "DB Plan Multipliers", MERS report from www.mersofmich.com/

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Court Rules

Miscellaneous

STATEMENT OF THE BASIS OF JURISDICTION

OF THE SUPREME COURT

This Court has jurisdiction pursuant to MCR 7.301(A)(2), as this is a matter in which Appellants sought review by leave of a case decided by the Court of Appeals. The final order in the lower court was entered on February 26, 2004, and on March 3, 2004, Appellants filed a timely Claim of Appeal in the Court of Appeals within 21 days of the entry of the final order, pursuant to MCR 7.204(A)(1)(a). Appellants then timely submitted their Application for Leave to Appeal to the Supreme Court on June 14, 2005, within 42 days of the Court of Appeals decision of May 3, 2005, as allowed by MCR 7.302(C)(2)(a).

The Court of Appeals had jurisdiction pursuant to Const 1963, art 6, §10 and MCL 600.308(1).

Leave to appeal was granted on December 28, 2005, 472 Mich Adv 986.

STATEMENT OF QUESTIONS PRESENTED

(As framed in the December 28, 2005 order granting leave to appeal, 474 Mich Adv 986)

Issue I: "What evidence supports the conclusion that the level of funding offered by the counties was insufficient to allow the court to fulfill essential court functions?"

Crawford and Kalkaska Counties, appellants, answer "none".

Issue II: "With respect to the dispute over pension and health care benefits, what evidence supports the conclusion that these benefits were reasonable and necessary to achieve the court's constitutional and statutory responsibilities, and that the court's failure to obtain such benefits so affected employee morale, or the court's ability to retain or hire competent employees, that they were reasonable and necessary to achieve the court's constitutional and statutory responsibilities?"

Crawford and Kalkaska Counties, appellants, answer "none".

Issue III: "Whether Crawford County entered into a contract with the 46th Circuit Court to fund pension and health care benefits at a specific level?"

Crawford and Kalkaska Counties, appellants, answer "no".

Issue IV: "Whether Kalkaska County entered into a[n enforceable] contract with the 46th Circuit Court to fund pension and health care benefits at a specific level?"

Crawford and Kalkaska Counties, appellants, answer "no".

Issue V: "Whether Crawford County or Kalkaska County entered into a [valid] contract with the 46th Circuit Court to fund pension and health care benefits at a specific level?"

Crawford and Kalkaska Counties, appellants, answer "no".

PRELIMINARY STATEMENT OF METHODOLOGY

In granting leave to appeal, 474 Mich Adv 986 (2005), the Supreme Court ("Court") has limited its review to three specific issues (quoted below *verbatim* as the Issues herein presented) which had previously been subordinated by Judge Kolenda to other issues. Not only has this dramatically shifted the focus of the argument, but it tends to conflate the task of summarizing the facts with that of advocacy. Yet the factual summary is required to be presented "without argument or bias". MCR 7.306(A); MCR 7.212(C)(6).

The Statement of Facts is accordingly presented in three distinct parts, each focused sequentially on one of the issues specified in the order granting leave. Each section of the factual summary is presented with "all material facts, both favorable and unfavorable". Additional facts, or argument based on those facts, will be found in the "Argument" section of this Brief.

Nonetheless, it must initially be noted that, as will be revealed below, there is (1) no objective evidence whatsoever to generate an affirmative answer to Question 1, (2) no evidence beyond conclusory assertions devoid of empirical basis to suggest an affirmative answer to Question 2, and (3) no evidence of a contract between Crawford County and the 46th Circuit Trial Court with respect to Question 3. As to Kalkaska County, there is evidence of a contract in regard to Question 3, but the legal analysis herein will demonstrate that such contract is either *ultra vires* and thus unenforceable, or was validly rescinded by a subsequent Kalkaska Board of Commissioners which took office after the contract was signed. A panoply of other legal doctrines independently precludes the enforcement of any contract claimed to have been made by either Crawford or Kalkaska County.

STATEMENT OF FACTS

The 46th Circuit Trial Court ("46th CTC" or "court") sued Crawford County ("Crawford") on November 19, 2002, claiming (Counts I and II, 144a-145a) that Crawford had underfunded the 46th CTC's budget-- by failing to appropriate and remit sufficient monies for enhanced fringe benefits commenced by the 46th CTC pursuant to its "implementation order #2000-11" issued December 3, 2000 (1702a)—for judicial operations for the years 2001-2003 (142a, ¶16), in violation of an alleged contract. The 46th CTC further alleged (Counts III and IV, 146a-148a) that the purported underfunding violated its "inherent powers" by rendering it unable to fulfill its statutorily mandated functions[1]. Kalkaska County ("Kalkaska") intervened on January 16, 2003.

The dispute centers around two enhanced employee benefits demanded by the 46th CTC[2]:

(1) replacement of an existing MERS[3] B-2 defined-benefit pension plan[4] (with a 2.0% multiplier) with a MERS B-4 defined-benefit plan (with a 2.5% multiplier[5]) at an initial cost of

---

[1] Count V sought payment of the 46th CTC's counsel's fees before and during the litigation; the resulting issues are being held in abeyance in Nos. 126088-90, 126846-49, 128880 and 1238886-7. The order granting leave precludes any discussion of such issues at this time.

[2] Although the 46th CTC has, in prior briefing, contended that the issue is a more general one of underfunding judicial operations, then-Chief Judge Davis testified that the dispute was only over the two benefits (1491a). The order granting leave appears to recognize that this is the case. Moreover, the 46th CTC filed a motion in limine on June 5, 2003, seeking to limit the scope of the evidence to only these two benefits (1289a).

[3] MERS (Municipal Employees Retirement System) was originally created by 1945 PA 135, and continued by 1984 PA 427, MCL 38.1501 *et seq*. See MCL 38.1502c(5).

[4] For two employees in one of the three probate courts, the plan being replaced is a MERS B-3 with a 2.25% multiplier. For employees in Otsego, the plan being replaced was a SEP defined contribution plan, the defined contribution being 6% of salary (Otsego switched to such a plan in 1982 at the insistence of its judiciary; in all likelihood, the Otsego judicial employees preferred the SEP Plan over the preexisting MERS plan because their share of assets could be rolled over into IRAs if they left their employment prior to retirement, while market yields were at record levels in 1982, and of course it was cheaper for Otsego.

[5] The importance of multipliers to the viability and affordability of any defined benefit plan is addressed by MERS in "DB Plan Multipliers", Attachment 5 (from www.mersofmich.com/).

16.34% of wages, 1921a, 1606a[6], 1630a), retroactive[7] as to all prior service credit for each employee, the maximum allowed by MCL 46.12a(2), and

(2) creation of a retiree health care plan, partially funded by one-eighth of judicial employees' annual 4% wage increase, the remainder to be funded by the counties at whatever the cost may be through at least 2017.

I. Level of Funding *vis à vis* Essential Court Functions

At the outset, the 46th CTC, through its administrator, admitted that its budget includes non-mandated functions, *e.g.*, district court probation (1416a-1417a) and a full-time law clerk (1464a). However, the administrator failed to calculate or specify the cost of these non-mandated activities.

---

[6] The increase to a B-4 raised Crawford's 2001 obligation to MERS for judicial employees by $95,000, Kalkaska's by $48,000, and Otsego's by $376,000 (1614a-1615a), and like amounts every year thereafter. Supposed "consideration" for such increase was relinquishment of judicial staff longevity pay, which amounted to only $9610 in 2001. (1999a). See also foonote 7 below.

[7] It was possible to upgrade to a B-4 without making it retroactive (1614a-1615a; see also 1855-1856a, "Prior Service Credit and the Prospective MERS Municipality"). By insisting on the retroactivity option, the 46th CTC created an unfunded liability of $1,388.898.49 (1608a, 1614a; 1932a), of which $794,077.48 was attributable to Otsego's 6% SEP Plan (1615a; 1932a). Otsego accounted for 86.6% of the increase in unfunded liability (1932a). However, Otsego did not bear this expense; rather, it was spread across all funding units according to their pro rata share of judicial costs (see 2nd ¶ below).

The effect of full retroactivity increases the ongoing pension cost of a B-4 from 10.64% of payroll to 16.34% (1635a), or 82% greater than the original B-2 (1636a). A non-retroactive B-3 pension would cost 9.58% of payroll (1636a), compared to 8.5% for the B-2. Total payroll in 2000 was approximately $1.84 million (1638a), so a B-3 plan would cost $19,872 more than the preexisting B-2 for that single year, a B-4 would cost an additional $39,376, and a retroactive B-4 an extra $144,256.

To put those and other numbers in perspective, by resolutions of each county, Crawford prior to 2000 paid 24% of the 46th CTC's total budget, Kalkaska 32%, and Otsego 44% (1565a; 1715a—note that these percentages varied slightly from year to year). Factoring in revenues from court cost assessments and collections, individual criminal defendants' reimbursements for appointed counsel in criminal cases, and State funding, Crawford's effective share of the cost of judicial operations was 20-21% (1410a). Thus, for 2000, Crawford was asked to appropriate $767,000 (1425a). Later in 2000, Crawford's share increased to 27% of the total, and it was asked to appropriate an additional $94,000 (1435a), *before implementing any disputed benefits.*

46th CTC Co-Administrator Rudi Edel *initially* testified that Crawford County cut its 2001 appropriation for judicial operations by $90,000, causing him to go "a little nuts" (1426a)[8]. Eventually, Edel calmed down, recalling that "county government periodically will adjust expenses or revenues to bring the budget into balance to get it passed." (1428a). The 46th CTC, however, made no effort to cut costs to accommodate Crawford (1458a), an approach supported by Judge Davis (1501a).

For its own part, the 46th CTC has sometimes exceeded its appropriations without prior approval of the funding units. (1428a-1429a). In all such cases, the three counties, upon request, have consistently made supplemental appropriations for judicial operations (*Id.*).

As for the $90,000 "shortfall" in 2001, Edel testified that the *actual* funds needed were only $52,800[9], and Crawford County duly paid that additional amount to Otsego County in December, 2001 (1429a). The only "shortfall" was that Crawford refused to pay an additional $15,700 deposit to the retiree health care fund, an amount advanced by Otsego (1430a)[10].

Year to year, the 46th CTC claims to need only a "flat" budget. However, the 46th CTC increased wages 4% annually from 1996-2003, while its employee health care insurance premiums increased between 19-21% per year (1431a). Judge Davis projected a 5% annual increase (2000a), but the actual figure was 11.7% (1996a).

---

[8] In complete contrast, when Otsego requested a budget reduction of $84,000 in 2002, Edel made every effort to comply, eliminating a full time district court clerk in Kalkaska County and a part-time friend of the court employee, generating savings of $81,000 (1418a, 1421a). This testimony undermines Edel's insistence that the 46th CTC was operating a "bare bones" budget (1420a), and demonstrates that no action by Crawford in 2001 jeopardized judicial operations at all.

[9] Even this "shortfall" was a product of the 46th CTC exceeding its own budget as well as its appropriations (1956a).

[10] Edel testified that the "missing" amount was paid by Otsego, and that Crawford owed that amount to Otsego (which Crawford later paid to Otsego at Judge Kolenda's direction), not to the 46th CTC (1430a). Likewise, any other "deficiency" in Crawford's appropriations is owed to Otsego, which advanced all the money requested by the 46th CTC (1449a).

In 2002, Crawford County appropriated $747,000 of $776,000 requested (1431a-1432a). The reduction was the result of declining to approve certain line items—added costs for enhanced pensions and retiree health care (1438a). Crawford otherwise paid its full share of the 46th CTC's actual expenditures through the end of 2003 (*Id.*).

Kalkaska, for its part, appropriated everything the 46th CTC requested of it through 2002 (1438a). But in December, 2002, Kalkaska declined to appropriate $26,000 in requested funding for retiree health care and enhanced pensions (1439a). Kalkaska, and apparently Crawford as well, understood that their 2003 budget reductions represented their pro rata shares of the $84,000 cut requested by Otsego and accepted by the 46th CTC (1439a; see also fn. 8 above). Edel agreed that the pro ration was accurate and appropriate, but insisted Kalkaska did not understand that the reduction was achieved both by new revenue and budget reductions (*Id.*)[11].

As a result of implementing $81,000 of the $84,000 in reductions requested by Otsego for 2002, the 46th CTC asserted that some employees had to work harder (although it provided no objective measure and did not claim any employee was overworked), and there was some backlog of work to an entirely unspecified degree. According to Mr. Edel, this "caused stress" and "caused a lot of work" (1420a), again without any factual details. However, the 46th CTC acknowledged it had no speedy trial problems in criminal cases, and no problems processing civil or criminal matters generally on a timely basis (1453a).

Edel claimed that the 46th CTC was unaware that its adoption of an enhanced pension plan retroactively created an unfunded liability, in consequence of which MERS was billing Otsego, as control unit on behalf of the 46th CTC, for some $52-53,000 annually (1450a-1451a).

---

[11] Whether the savings requested by Otsego were achieved by spending cuts or revenue enhancements, or by some combination, that nevertheless should have resulted in Kalkaska, Crawford and Otsego being able to appropriate, in total, $84,000 less than initially requested.

A further claimed operational funding shortage resulted from the 46th CTC's action of hiring legal counsel (1460a-1461a). When the 46th CTC requested supplemental funding, Crawford County responded by posing four questions, inquiring as to the justification for the request, and whether any effort had been made to reduce expenditures or increase revenues, to which no answer was ever received (1461a-1462a; 1502a-1503a).

When the 46th CTC laid off some personnel in 2002 to generate the savings requested by Otsego County, it was nevertheless able to fulfill its mandated functions (1463a). It made no attempt to accommodate Crawford's similar request in the 2001 budget year (1501a, 1458a, 1506a-1509a; see also footnote 8, *supra*). The shift to a PPO health care plan with co-pays in 2001 was supposed to generate initially a 50% savings in that area (1513a), but Judge Davis could not, or would not, account for where the resulting savings were reflected in budget requests or overall expenditures (712a). In fact, there is no evidence such savings were realized.

The 46th CTC's "expert" witness, former Oakland circuit judge Barry Howard, testified that he "didn't see a lot of fat" in the court's various budgets (1525a). Yet the 46th CTC expended significant sums on extraneous expenses such as Jerry Spence seminars in Wyoming, meal reimbursements, staff picnics, cell phones, and travel (851a, 874a, 880a, 1936a, 1938a, 1942a, 1947a).

Crawford Commissioner Scott Hanson testified that his concern was that Crawford's budget be balanced, as required by law (1546a; MCL 141.421). Crawford has no fund balance, rainy day fund, or any other funding source to make a deficit budget legally possible (1547a). Crawford County consists of 70% state and federal land within its borders (1548a-1549a), which generates no taxes and only minimal revenue, causing the county's tax base to be relatively low (1547a). Hanson noted that an audit of the three counties showed that the 46th CTC's budget had

been increasing at an annual rate of 5.8%, well above SEV and revenue increases, and thus beyond what Crawford could sustain (1552a). Crawford also has suffered reductions in court equity funding from the state and lost 2.9% in state revenue sharing (1586a, 1588a). That was why Crawford informed the 46th CTC it would increase judicial funding by just 2.5% in 2002 over 2001 (1550a-1552a), while at the same time Crawford was reducing its own county workforce by not replacing anyone who retired[12].

Crawford received no response to its December, 2001 communication to the 46th CTC (1552a-1553a).

In stark contrast, Otsego County has a tax base which, per capita, is 38% higher than Crawford's (1991a, 1992a) and 27% higher than Kalkaska's (*Id.*).

Fred Todd, a lawyer and accountant with master's degrees in Public Administration (Univ. of Michigan) and Business Administration (Indiana Northern Univ.), formerly controller and chief administrative officer of Saginaw and Ingham Counties and former budget director of Wayne County, was the Counties' expert witness (1959a-1965a). Todd testified that the 46th CTC's request for a 2003 budget 11.7% greater than its 2002 budget was unreasonable, inasmuch as the Consumer Price Index (CPI)—which directly relates to personnel costs (which constitute 88% of the 46th CTC's budget [1966a-1967a]) and tax revenue—increased by a much lower 1.6% (1617a; Attachment 1[13]).

---

[12] Crawford had already reduced and then eliminated altogether its Sheriff's road patrol, eliminated its Assistant Zoning Director and 4H Extension services, and reduced the number of county employees by 40% (from 20 to 12.5), while also reducing employee health care benefits (1554a-1555a, 1557a, 1559a-1560a, 1591a-1592a). Crawford eliminated its Commissioners' per diem in 1999 (1557a), having already reduced commissioners' salaries by 50% in 1997 (1590a). Crawford had attempted to add 2 mills of taxation to restore the road patrol, but that failed at the ballot box (1556a).

[13] Attachment 1 is p. 1 of a federal report found at http://www.bls.gov/cpi/cpid02av.pdf

In both Crawford and Kalkaska, tax base grows at no more than the rate of inflation pursuant to Const 1963, art 9, §26, so funds available can be expected to grow at no higher rate (1626a). Todd noted that municipalities facing, *e.g.*, rising health care premiums generally look for plan design change, or employee contributions to the cost of premiums (1620a). The 46th CTC has not been proactive in this area. If health care costs cannot be reduced, then wages have to yield (1620a-1621a). New hires could be offered lower pension or other benefits as alternative saving measures (1623a-1624a). Todd also noted that, in 2003, the 46th CTC spent 55¢ in fringe benefit costs per $1 of wages, compared with 43.2¢ in 2002 (1967a)[14], a 27.3% increase, which is facially unreasonable (1623a). From 1991-2002, the CPI increased 14.7%, while the 46th CTC's wages rose 49.9% (1985a), and the Probate Register's salary increased 47.3% (1986a). Generally, 46th CTC wages increased 14.9-32.6% *more* than inflation (1984a).

Todd suggested the 46th CTC could reduce pension costs by, *inter alia*, not enhancing benefits at all, not enhancing benefits for past service, or establishing a fixed percentage of payroll the counties are willing to pay for pensions, and allowing employees to contribute if they desire better benefits. (1913a).

II. Pension and Health Care Benefits: Reasonableness and Necessity; Employee Morale, Retention and Hiring

The 46th CTC's Complaint makes no claim that employees resigned (or even threatened to resign) due to pre-existing fringe benefit levels. Allegations of a "morale" problem only appeared near the end of the litigation, at the suggestion of Judge Kolenda.

Both of plaintiff's experts, Barry Howard of Oakland County (1519a) and Ross Childs of Grand Traverse (1528a-1534a) testified their local courts—like the Court of Appeals and

[14] In dollar figures, the 46th CTC's personnel costs rose from $814,506 in 2002 to $1,072,512 in 2003 (1967a).

Supreme Court—already had dropped defined benefit plans in favor of less costly defined contribution plans[15]. Oakland and Grand Traverse[16] each contribute a maximum of 9%[17] of wages to a defined contribution plan (1518a-1519a, 1539a), and both treat judicial employees and county employees alike in that regard (1516a-1517a, 1527a). Grand Traverse also eliminated longevity pay (1530a). Oakland is Michigan's single most affluent county[18]; Crawford and Kalkaska are among Michigan's poorest counties.

The 46th CTC administrator, Mr. Edel, testified only that, when there was a temporary staff cut due to his efforts to generate the $84,000 in savings requested by Otsego, things "backed up" to an unspecified degree, which "caused stress" and "caused a lot of work" (1420a).

The subjective testimony relating to "morale" began with Mr. Edel's testimony that, after an initial period of consolidated operations (following non-legislative creation of the 46th CTC by Admin Order 1996-9 and 1997-12), "morale was high", and especially so after Judge Davis prematurely announced to the 46th CTC's employees that they would receive enhanced B-4 pensions retroactively for all prior years of service, and retiree health care (1413a). However, following Crawford's refusal to fund those enhanced benefits "as they agreed to in June of 2000"[19], "[m]orale since then has really plummeted" and "[t]oday morale is . . . very tense." (1413a). Edel immediately conceded he was not present when Judge Davis spoke to the employees about the funding dispute, and really does not know what was said or what its effect

---

[15] Judge Kolenda, who had a defined benefit plan for himself, misunderstood the workings of defined contribution plans, but considered the matter inconsequential (1645a-1646a).

[16] Edel relied on Grand Traverse, Charlevoix, Emmett, Ogemaw and Alpena for comparison (1412a). However, Emmett County, like Grand Traverse, has also shifted to a defined contribution plan (1611a).

[17] The Legislature has provided that the assumed actuarial rate for state employees' pensions, which have a 1.5% multiplier, is 8% of payroll. MCL 38.49(8).

[18] Oakland County is the 5th most affluent area in the United States (1515a).

[19] This date is inexplicable, as the 46th CTC has consistently pointed *only* to Crawford's August 29, 2000 resolutions as contractual, as detailed in Part III of this Statement of Facts.

may have been (1414a). According to Edel, the "morale" issue solely concerns the effect of "taking away" enhanced benefits that were only *anticipated* because of what Judge Davis told his employees (1443a).

Judge Davis testified that his staff "soldiered on very well", but "their mood is not good. They are apprehensive. They are under pressure. They are distracted. We don't have the esprit de corps and the excitement of generating new ideas and finding better ways to do things . . ." (1491a). If he could not make good on his promises, "It'd be a disaster" because the staff could no longer work "with joy" (1492a). That sentiment was echoed by Barry Howard (1514a).

Judge Davis thought "there are probably people who'd pack their bags, without being able to specify who; couldn't tell you, but it wouldn't surprise me." (1492a) However, no evidence was presented that any employee(s) actually indicated they would leave, or that the 46th CTC would be unable to recruit and hire (a) qualified replacement(s). Judge Davis acknowledged that if his staff were to receive enhanced benefits not available to county employees, with whom in many instances they work in close proximity on a daily basis, that would negatively impact the morale of county employees, but he testified that was of no concern to him (1500a).

Linda Franklin, the Crawford Register of Probate and former Crawford county employee (who transferred to the 46th CTC before any discussion of enhanced benefits), testified she would be demoralized and disappointed if the "promised" benefits were not forthcoming (1535a). She thought an adverse decision would cause some turnover and affect productivity (*Id.*), but *identified no one, including herself, who would quit or engage in a work slowdown or stoppage.*

In terms of employee retention, Edel testified that between May, 1996 and July, 2001, the

46th CTC had lost 36 employees[20], and as of the time of his trial testimony the number had risen to 46 or 47. Of those, 4 or 5 were discharged, an unspecified number moved out of the area, and another unspecified number "left the court because they were dissatisfied with wages, benefits"[21], while some others were unhappy with court reform generally, and still others "with a shift in their job duties." (1423a). Three retired (1467a). Ultimately, however, Mr. Edel acknowledged he could not identify even one employee who quit because the benefits offered were inadequate (1468a-1469a):

> Q And which of these six employees told you or told a representative of the court that they were leaving as a result of a better retirement or a better retiree health insurance plan?
> MR. KIENBAUM: Your Honor, it's been asked, it's been answered. It's getting to the point of argument. **The witness has said he doesn't recall anybody saying that.**
> * * *
> THE COURT: .... **I've heard him say nobody.** So if you want to press the point to see if somebody comes to mind go ahead, but –
> MS. TOSKEY: Thank you, your Honor.

Plaintiff's judges were equally unable to identify any employees who complained to them about benefit levels. (*e.g.*, Judge Murphy, 1223a). Through discovery, only one employee could be identified who quit to take other employment. Ironically, that employee moved to Lansing in order to work for the Court of Appeals, which then and now offered *lower* pension benefits[22]!

---

[20] At the time of trial, the 46th CTC had 57 employees, compared with 64 in 1996 (1409a).

[21] On cross-examination, Edel claimed that number was 2 or 3, but neither he nor Tom Haskell (the 46th CTC's co-administrator), whom he consulted, could recall (1466a). Edel thought 6 employees left for better wages and fringe benefits, without specifically mentioning the retirement plan, and he did not know whether wages or benefits was the motivation (1468a).

[22] As the Supreme Court is aware, appellate court staff (and state employees generally) in Michigan had the same pension plan as Civil Service employees, a defined benefit plan available until 1997 with a 1.5% multiplier, MCL 38.20(1) and a limited COLA benefit ($300 per year maximum). After 1997, new hires went on a defined contribution plan (and existing employees could choose to switch to the new plan). Prior to 1974, appellate court staff had to contribute a portion of after-tax wages to participate in the pension system. See MCL 38.11(2).

Judge Davis testified regarding staffing levels that, as of the time of trial, the 46th CTC was at "a point where it can still do its job and do it effectively." (1474a). However, Davis hoped increasing existing benefits might avoid unionization of his work force (1476a)[23]. Consequently, Davis then sought the best possible pension plan for his staff (1494a), without regard for cost (1494a-1495a, 1498a[24]). Davis believed that in county government generally there are people who ought to retire due to burn out, incompetence, or infirmity but who do not, or cannot, because of healthcare costs, which are covered by their employers while they actively work (1477a). However, he did not identify any of his employees as fitting that description.

Davis wanted—and got—all three counties to agree to a 4% wage increase for each of three years, although inflation was running at only 3.1% or less (1478a). Of that 4%, Davis allocated 0.5% to partially bankroll his proposed retiree health care fund. Davis also thought he could save $80,000 over 15 months by switching the active employee traditional health plan with no co-pays or deductibles (which he described as "antiquated and excessively expensive") to a PPO with $10 prescription drug[25] co-pay, and he proposed to phase out longevity pay (a $10,000 aggregate annual outlay, 1999a) to "fund" the enhanced B-4 pension. Davis promised to "sell" the idea to his employees if the counties would agree. (1478a-1479a, 1487a).

Davis' proposal was initially met with an open mind, but it was understood that the three

---

Retired state employees as of 2000 found that their health care plan prescription co-pays had increased to $10 (up to $30 for non-formulary medications), and their liability (deductible) for physician services had increased from $100 to $1000.

[23] Thus, there was never any "bargaining" with 46th CTC employees, who had no certified collective bargaining representative.

[24] Because Judge Kolenda had summarily ruled that Crawford's August 29, 2000 resolutions created a binding contract, the scope of the evidentiary phase of trial, particularly the defense side, was constricted, as reflected in Mr. Kienbaum's objection and Judge Kolenda's ruling during cross-examination of Judge Davis (1495a-1498a).

[25] Exactly the same PPO plan was already in effect for judicial and county employees in Crawford, so the proposed "switch" was of no benefit to Crawford.

county comptrollers had to "crunch the numbers" (1480a-1481a)[26]. *Before the counties agreed*, however, Davis on his own told his employees what he intended to obtain for them and what they were to do on their end, and they agreed (1489a).

Marvin Henderson, CPA and a consultant and auditor to Crawford (1570a), testified that Davis' written proposal failed to address concerns that his plan would become insolvent if his cost projections proved optimistic (1580a-1581a). Generally, he advised Crawford to stay away from any benefit proposal for which the cost had not been determined by a proper actuarial study (1572a-1573a; 1970a).

Judge Davis conceded that court employees were in the same position as county employees in terms of not having a retiree health care plan (1493a)[27]. Marvin Henderson testified it was not sensible to put additional pressure on county budgets already struggling under the effects of the Headlee Amendment tax ceiling by increasing benefits for retirees, instead of focusing on compensating employees still actively providing services (1575a). County employees and officials in Crawford, for example, had been laboring under a four-year wage freeze, while 46th CTC staff were enjoying a 4% increase each year (1575a). Henderson consequently advised the Crawford Board not to even "touch" the B-4 pension issue without an actuarial study to establish the additional cost, especially given the complexity of consolidating three different existing plans and their assets (1579a).

---

[26] Davis' proposal had no actuarial underpinnings whatever (1576a, 1640a), and creates an unfunded liability (1576a). His proposal assumed annual premium cost increases of 4%, but in 2001 the BCBSM premiums increased 21% (1431a). CPA Marvin Henderson's calculations using actual premium costs and demographic data for each judicial employee revealed that the Davis proposal was doomed to rapid insolvency (1577a; 1970a).

[27] In Otsego County, elected officials and department heads only—judges and Mr. Edel—already had a retiree health care supplement of $250 per month between ages 62 and 65 (when Medicare is available) towards the cost of health insurance premiums (1422a).

With respect to B-4 and Admin Order 1998-5, Mr. Edel conceded that in 2000 there was not a single employee in Crawford County working under a B-4 pension plan (1455a-1456a)[28]. Kalkaska County had one unit of sheriff's deputies with a B-4 plan, *but those employees were contributing a percentage of salary towards their pensions*, while Otsego County had two units (also consisting of sheriff's deputies) with B-4 plans (1456a). No employee of the 46th CTC was entitled to a B-4 pension as of 2000 (*Id.*).

Thus, Mr. Todd opined that shifting to a B-4 is unreasonable, as otherwise comparable county employees would be clamoring to work for the 46th CTC (1629a-1630a). Todd testified that a B-2 or B-3 plan is appropriate for most judicial employees, and noted that there is no requirement that all employees have identical pension benefits. For example, key executives might be offered better benefits than clerical employees (1631a). As for retroactivity, Mr. Todd noted that the taxpayers have already paid for prior service, and ought not to be asked to pay for it a second time (1635a). Todd considered that a shift to a defined contribution plan was far superior to enhancing the existing defined benefit plan (1638a-1639a).

Concerning retiree health care, Todd opined that a reservation of rights clause, allowing the counties to alter the plan to factor in changes in health care and drug costs, was a necessary element that was lacking in Judge Davis' proposal (1646a-1648a). Such a clause is needed to avoid exactly the kind of perpetual contract argument being made by the 46th CTC (1647a). Defined contribution retiree health care plans are readily available in the market (1648a). Yet, although Judge Davis represented that he had included such a provision (2003a), his actual

[28] Subsequently, sheriff's deputies in Crawford, on the eve of an Act 312 arbitration, negotiated a *non-retroactive* B-4 pension plan to which employees had to make their own cost-defraying contributions. However, all the experts agreed that "Act 312" employees—law enforcement, firefighters—are properly treated differently due to the hazards of their jobs and resulting shorter working lives and reduced life expectancies. To like effect see MCL 418.405.

proposed contract omitted his own modification and gave the Chief Judge alone absolute authority to make any changes (1685a, ¶¶3 and 4).

III. Whether Crawford and/or Kalkaska Contracted to Fund Pension and Health Care Benefits at a Specific Level

Judge Kolenda[29] granted partial summary disposition on May 30, 2003 (8a), holding that Crawford County's August 29, 2000 resolutions created binding contracts as to each disputed enhanced benefit. This significantly affected the scope of the evidentiary phase regarding the contract issue (1404a-1406a). Judge Kolenda also ruled, prior to hearing any evidence (1407a), that "no one's got any complaint about what Otsego has done because it's done things right.".[30] Hence, much of the key evidence is only found in the cross-motions for summary disposition and responses, per MCR 2.116(G)(6).

As to the August 29, 2000 Crawford resolutions, the first, which was introduced by Commissioner Scott Hanson, provided (523a):

> County pay 24%[31] of $50,000. ($12,000) for the year 2000 and that payment will increase at 4% per year until 2017, and at that time will pay an estimated $94,649 and that the Blue Cross/Blue Shield medical supplement payment per individual would be capped at the year 2000 at $4,087 would increase at 4% per year until 2017 for an employee to be eligible for $7,654 per year.

Hanson testified that he couched the motion in those terms, relying on the information supplied by the 46th CTC's agents, because of his concerns over unfunded liabilities (1568a).

Later on August 29, 2000, the Chief Judge contacted the Chairperson of Crawford to notify her of a "mistake" in the base rate health insurance cost assurances furnished by Mr. Edel, which formed the express basis of Crawford's resolution as to retiree health care. Chairperson

---

[29] Because the 46th CTC is the plaintiff-appellee, and "Court" refers to the Supreme Court, to avoid confusion "Judge Kolenda" is used throughout in lieu of "trial court" or "lower court".
[30] Crawford and Kalkaska vehemently disagree, but that issue is presented in No. 128880.
[31] 24% represents Crawford's then-agreed pro rata share of liability for judicial operations; Kalkaska's share was 32% and Otsego's 44%.

Corlew then communicated to other commissioners that Judge Davis had rejected Crawford's August 29, 2000 proposal, an understanding confirmed on September 6, 2000, when Judge Davis tendered to Crawford a proposed "contract" with materially different terms. After a year of unsuccessful efforts to resolve the problem, the August 29, 2000 resolution was rescinded on February 1, 2002, the Crawford Board reciting that it had been misled by the erroneous information supplied by Mr. Edel (1840a).

Also at the August 29, 2000 Crawford Board meeting, Commissioner Wieland (who strongly and unwaveringly supported the need for a MERS actuarial study before any future action by the Crawford Board (1716a), moved to reject adoption of the MERS B-4 plan, seconded by Commissioner Hanson (the next most vocal supporter of not considering the Proposed MERS B-4 Plan until the next budget year, when an actuarial could be performed, (1716a). The motion was recorded as follows (1663a):

> Motion by Wieland, second by Hanson, to request the Court not implement the MERS B-4 upgrade at this time, but recognize the change in the 2000-2001 budget cycle.

The Crawford Board is UNANIMOUS that its intent in passing this motion was not, as asserted by plaintiff, to permit "implementation" of the B-4 during the next fiscal year (2 years before the requested 2003 date). Rather (after first receiving actuarials as required by MERS), it was the Board's intent to consider this issue during the next budget cycle, with actuarially supported hard figures facilitating an evaluation of the idea (424a, 557a, 585a, 589a, 593a).

Further, under the 46th CTC's proposal, the B-4 Plan was not to be implemented until 2003. It was instead implemented on August 14, 2001 by Otsego and the 46th CTC.

Judge Davis took the position that when he proposed pension and retiree health care enhancements in late spring, 2000, the fact that the county representatives listened respectfully and did not reject the ideas out of hand meant there was an agreement in principle, despite the fact that all three counties wanted their comptrollers to "crunch the numbers" (1480a-1481a).

Mr. Edel followed suit, contending that agreements had been reached during the summer of 2000, in meetings with representatives of each county[32] (1441a). Mr. Edel testified he had never heard of nor seen another instance in which there was a contract for a benefit increase of this type (1442a), and the idea of a written contract was Judge Davis' (1441a).

Judge Davis did circulate a written agreement concerning enhanced retirement benefits for review and execution by the counties (565a-584a) under cover letter dated September 6, 2000 (563a-564a) in which Judge Davis referred to the "proposed contract". Both Otsego and Kalkaska eventually signed[33]. However, Crawford refused to sign (1444a-1445a), despite the

---

[32] This informal "judicial council" had two representatives from each county, but each county still had to approve any recommendation and make any ancillary appropriation in a properly noticed open meeting, MCL 15.263, with a majority of a quorum of that county's Board voting in favor of any action, MCL 46.3.

Note that even had they attempted to do so, Crawford, Kalkaska and Otsego, singly or collectively, could not delegate their respective powers over county appropriations to any judicial council or other body. As this Court held in *Sittler v Bd of Control of Eastern Mich College of Min & Tech,* 333 Mich 681, 686-687 (1952):

> "The board of supervisors cannot delegate such powers as the law requires to be submitted to their corporate discretion and judgment." *People ex rel Chadwick v County Officers of St Clair* (syllabus), 15 Mich 85.
>
> "The statutory authority conferred upon boards of supervisors to regulate the bridging of navigable streams is a trust that must be executed by themselves; they cannot delegate it to others * * *." *Maxwell v Bay City Bridge Co* (syllabus), 41 Mich 453; 2 NW 639.

See the further discussion of *Sittler* and related concepts *infra*, pp. 35 ff.

Note that if Admin Order 1998-5, Part IV, were to be construed as purporting to allow such a delegation to a "local court management council", then Admin Order 1998-5 would be an unconstitutional usurpation of the Legislature's exclusive power under Const 1963, art 7, §1 to define the powers of counties.

[33] Kalkaska's Board of Commissioners adopted a motion "to approve the benefits program for the courts as presented" on October 10, 2000, following which its Chairperson signed the document tendered by Judge Davis. That resolution was rescinded on December 11, 2001 when Kalkaska learned Crawford had refused to sign (1655a). Kalkaska understood that no county

threat that, by failing to sign, it would somehow be liable for additional costs of $351,000 (1564a; 1696a, 1993a, 2000a). On September 27, 2000, Judge Davis sent Crawford an addendum that gave a joint management council the power to terminate retiree health care if the proposed fund became insolvent (1447a, 1693a, 2003a). However, the actual contract, which was signed immediately by Otsego and later by Kalkaska, instead granted the Chief Judge "the absolute right and authority to change benefits and terms of coverage" for retiree health care, and likewise the "absolute right and authority to decide any and all questions or disputes * * * concerning the nature and scope of benefits" (1685a, ¶¶3 and 4). Notwithstanding this written contract drafted by the 46th CTC, Mr. Edel and Judge Davis both testified a written agreement was not the least bit necessary (1441a, 1485a-1486a). Former judge Barry Howard agreed (1521a), as did Grand Traverse Administrator Childs (1526a), but Mr. Howard conceded that the counties might have relied on Judge Davis' insistence on a written contract (1522a-1523a).

In contrast, Crawford Commissioner Shelly Pinkelman testified that the parties had understood there was no agreement unless all signed a written contract (1540a-1541a, 1545a, 1696a). Pinkelman also testified that Crawford's August 29, 2000 resolution as to the B-4 plan meant no more than that Crawford would consider implementing a B-4 for 2002, not that it agreed to do so (1544a). Scott Hanson, a Crawford Commissioner, likewise testified that, at all times, nothing short of a written contract would signify agreement, as there were so many unresolved issues (1561a-1563a), and that on August 29, 2000, Crawford had simply agreed to table further discussion of the B-4 until the next budget cycle (1566a-1567a, 1569a). Significantly, Crawford never entered into contracts without first obtaining advice from its legal counsel (1565a), who did not attend the August 29, 2000 meeting.

---

was bound unless all agreed to a written contract (1651a-1655a). Otsego likewise unanimously resolved that unless all three counties signed, no county would be bound (1270a).

Crawford repeatedly requested actuarials to establish the true cost of the enhanced benefits, but Judge Davis refused to share actuarials received by the 46th CTC (1181a, 1952a).

IV. Chronology of Proceedings

This suit was filed on November 19, 2002 (1a, 136a-152a). After partial summary disposition on May 30, 2003 (8a-32a) as to the contractually binding effect of Crawford's August 29, 2000 resolutions, the case went to trial on what Judge Kolenda identified as the remaining pertinent "factual" issues (1404a-1406a). At the conclusion of trial, Judge Kolenda ruled that Crawford was contractually bound by its August 29, 2000 resolutions without any further written agreement, that Kalkaska was contractually bound by virtue of its execution of the written contract on October 10, 2000, and that the disputed enhanced benefits were both "reasonable and necessary" (33a-87a).

The Court of Appeals affirmed in a published decision, *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150 (2005) (115a-135a), following which Crawford and Kalkaska timely sought leave to appeal, which was granted limited to the three below-quoted issues, 474 Mich Adv 986 (2005). In all other respects, leave to appeal was denied, and all related applications for leave to appeal were ordered held in abeyance.

ARGUMENT

Issue I: "What evidence supports the conclusion that the level of funding offered by the counties was insufficient to allow the court to fulfill essential court functions?"

Standard of Review

With respect to the first two issues specified in the order granting leave, both of which are focused on "inherent powers" concerns, any discussion necessarily begins with the fundamental proposition that this is a judicially-created constitutional principle. Under the "inherent powers" doctrine, the legislative power of the purse, Const 1963, art 4, §1; *Univ of Michigan Regents v State,* 395 Mich 52, 70-71 (1975), is superseded in order to preserve the separation of powers mandated by the Constitution, Const 1963, art 3, §2, and the independence of the judiciary as a co-equal branch of government in accordance with Const 1963, art 6, §1. *Wayne Circuit Judges v Wayne County (on Rehearing)*, 386 Mich 1 (1971), adopting 383 Mich 10, 33 ff (Black and Dethmers, dissenting) (1969). Such constitutional issues are reviewed de novo on appeal. *DeRose v DeRose*, 469 Mich 320, 326 (2003); *Armstrong v Ypsilanti Charter Twp,* 248 Mich App 573, 582-583 (2001).

An "inherent powers" claim requires proof that legislatively-authorized appropriations are insufficient to allow a court to fulfill its statutorily mandated functions, and that the additional funding demanded is both reasonable *and* necessary, *Ottawa County Controller v Ottawa Probate Judge*, 156 Mich App 594, 600 (1986). As held in *Wayne County Prosecutor v Wayne Co Bd of Comm'rs*, 93 Mich App 114, 123-124 (1979), when the executive or judicial branch files suit based on inherent powers, it must plead and prove that the appropriations do not

allow functioning at a "serviceable" level[34] (emphasis added):

> We adopt "serviceability" as the standard to be applied in determining whether the Board of Commissioners has unlawfully underfunded the county executive officers so that they are unable to fulfill their statutory obligations. Serviceability must be defined in the context of Justice Black's opinion, *i. e.* "urgent", "extreme", "critical", and "vital" needs. A serviceable level of funding is the minimum budgetary appropriation at which statutorily mandated functions can be fulfilled. A serviceable level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function. A serviceable level is not the optimal level. **A function funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out**. A function funded below a serviceable level, however, will not be fulfilled as required by statute.

Accord: *Wayne Co Sheriff v Wayne Co Bd of Comm'rs*, 148 Mich App 702, 708 (1983).

The burden of proof of any such claim of unconstitutional underfunding falls on the claimaint. *Employees & Judges of 2nd Judicial District Court v Hillsdale County*, 423 Mich 705, 716, 722 (1985); see also *Gora v City of Ferndale,* 456 Mich 704, 711 (1998). The level of proof required is the highest known to the civil side of the law, clear and convincing evidence. *17th District Probate Court v Gladwin County*, 155 Mich App 433, 453 (1986).

There is, in that regard, the usual strong presumption in favor of the constitutionality of legislative action[35]. *Oakland County Taxpayers League v Oakland County Bd of Supervisors*,

---

[34] The Court of Appeals agreed with Crawford and Kalkaska as to this standard, *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 165-166 (2005) (124a), and neither the 46th CTC nor Otsego cross-appealed as to that issue.

[35] For this purpose, there is no relevant distinction between the state legislature and county legislatures. Although the trial courts are state agencies in the sense of being part of the "one court of justice", *Judges of the 74th Judicial District v Bay County*, 385 Mich 710 (1971), funding of the trial courts continues to be essentially local, and any state contributions to such finances are essentially voluntary. *Grand Traverse County v Michigan*, 450 Mich 457 (1995); *Cameron v Monroe Probate Court*, 457 Mich 423 (1998). Local legislatures thus have the constitutional authority to fix judicial appropriations; only if the funding provided is insufficient to sustain mandated judicial operations may further expenditures be compelled. The judicial power thus remains confined to its proper sphere, *In re Muskegon County Bd of Comm'rs*, 188 Mich App 270, 281 (1991), and trial courts must operate within their legislatively-established budgets. *Branch County Bd of Comm'rs v Service Employees Int'l Union, Local 586*, 168 Mich App 340, 352 (1988). It is the essence of republican government, guaranteed by US Const, art

355 Mich 305, 323 (1959); *Lake Shore Coach Lines v Alger*, 327 Mich 146, 153 (1950). Anything less means the judiciary usurps the legislative prerogative over appropriations, Const 1963, art 3, §2, when the remedy for any abuse of legislative discretion must be found at the ballot box. *Warda v City Council of the City of Flushing*, 472 Mich 326, 333 (2005).

Because any "inherent powers" claim involves tension between competing constitutional doctrines—the legislature's exclusive power of the purse on the one hand against the judiciary's need for sufficient funding to fulfill mandated functions on the other—appellate review of any findings of fact by a lower court must be de novo, to assure proper deference to legislative prerogative and requisite strict adherence to constitutional responsibility. *Bose Corp v Consumers Union of US, Inc*, 466 US 485, 500 ff; 104 S Ct 1949; 80 L Ed 2d 502 (1980); *Ornelas v United States*, 517 US 690, 699; 116 S Ct 1657; 134 L Ed 2d 911 (1996); *Fiske v Kansas*, 274 US 380, 385-386; 47 S Ct 655, 656-657; 71 L Ed 1108 (1927).

De novo factual review was applied in *Employees & Judges of 2nd Judicial District Court v Hillsdale County, supra*, 423 Mich at 724-725:

> On this record there is no allegation and no proof that the additional salary item(s) were required to be funded by any formulation of the inherent power doctrine. * * * The opinion of the trial court in *Employees & Judges of 2nd Judicial District Court v Hillsdale County* was not based on an asserted constitutionally conferred power to compel increased compensation for the district court employees, nor was it premised on an impairment of a statutory function. Therefor, we reverse.

IV, that the people are empowered to elect new legislators, at both local and state levels, who are not bound by anything their predecessors did. *Studier v MPSERB*, 472 Mich 642, 660 (2005); *Atlas v Wayne Co Bd of Auditors*, 281 Mich 596, 599 (1937).

The Court seems already to have recognized this principle in this very case in its order granting leave herein, 474 Mich Adv 986 (2005), which portends a de novo re-evaluation of the facts relevant to each issue by its fact-centered formulation of each issue[36].

Admin Order 1998-5 imposes further constraints on a trial court's ability to pursue an "inherent powers" funding claim. Admin Order 1998-5 provides, in relevant part:

> VI. Consistency with Funding Unit Personnel Policies
> To the extent possible, consistent with the effective operation of the court, **the chief judge must adopt personnel policies consistent with the written employment policies of the local funding unit.** Effective operation of the court to best serve the public in multicounty circuits and districts . . . may require a single, uniform personnel policy that does not wholly conform with specific personnel policies of any of the court's funding units.
> * * *

Admin Order 1998-5 thus makes clear that judicial employees are to be treated *on a par* with other employees of the funding unit(s); judicial employees are not to be *favored* with special treatment with respect to wages, hours, or fringe benefits.

Hence, even if certain employee benefits were shown to be otherwise "reasonable", they are not "necessary" if superior to those offered to county employees in Crawford, Kalkaska, or Otsego. A trial court cannot in a lawsuit demand more for its employees than what the counties pay to similarly classified non-judicial employees.

---

[36] Alternatively, the issues framed by this Court are mixed questions of law and fact, involving application of (constitutional) law to the facts, which would in any event be subject to de novo review. *Johnson v Harnischfeger Corp*, 414 Mich 102, 121 (1982); *Outdoor Advertising Systems, Inc v Korth*, 238 Mich App 664, 668 (1999).

But even if review were for clear error under MCR 2.613(C), there is no competent evidence to support any of the "findings" made by Judge Kolenda, and the Court will be left with a "definite and firm conviction that a mistake has been made" by both lower courts. *Bynum v Esab Group,* 467 Mich 280, 285 (2002).

Analysis[37]

The record lacks requisite clear and convincing evidence that the level of funding offered by the counties was insufficient to allow the 46th CTC to fulfill essential court functions

Judge Davis and Mr. Edel testified that, both before and after this dispute arose, the 46th CTC had fulfilled, and was continuing to fulfill, all its essential functions (1430a, 1449a, 1463a, 1474a). The 46th CTC had no problems with speedy trials in criminal cases, and no processing

---

[37] Pursuant to *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614 ff (2004), the Court may wish to consider *sua sponte* a threshold jurisdictional issue (of law), *Lee v Macomb Co Bd of Comm'rs,* 464 Mich 726, 734 (2001), *viz.*, whether the 46th CTC has standing to raise an inherent powers claim. An action must be prosecuted in the name of the real party in interest. MCR 2.201(B); *Hoffman v Auto Club Ass'n,* 211 Mich App 55, 94-96 (1995). Here, Mr. Edel testified (1429a-1430a, 1436a-1440a, 1449a and footnote 8 *supra*) that Otsego advanced all monies demanded by the 46th CTC, and *if there is any liability on the part of Crawford, it is owed to Otsego, which has not sued on the claim.* Indeed, Otsego's counterclaim brought into play MCR 2.203(A), so Otsego's failure to seek reimbursement of such sums in its counterclaim herein bars it from pressing any such claim now or in the future. *Energy Reserves, Inc v Consumers Power Co,* 221 Mich App 210, 217 (1997). For its part, therefore, the 46th CTC has not suffered a particularized injury.

Had this case been brought by any other type of litigant, the foregoing facts would present a clear case for requesting sanctions under MCL 600.2591 and/or MCR 2.114(D) and (E). Here, however, even if sanctions were awarded against the 46th CTC, they would be uncollectable—Crawford and Kalkaska would either have to appropriate additional funds only to reclaim them as sanctions, or the effort to enforce a sanctions award of that magnitude would impinge on the 46th CTC's ability to fulfill its mandated responsibilities. Rather than engender such an ultimately circular process, Crawford and Kalkaska instead respectfully urge this Honorable Court to revisit Admin Order 1998-5 with an eye to protecting funding authorities from meritless "inherent powers" lawsuits that they can win only after expending vast sums to defend themselves, thus guaranteeing that, whatever the outcome, it will be the taxpayers who suffer, either in the form of increased taxes or reduced government services. Disciplinary sanctions by the Judicial Tenure Commission, facilitated by appropriate amendments to the Code of Judicial Conduct, might be the only practical way to deter the trial judiciary from, as here, using the threat of litigation with its attendant expense in an attempt to extort enhanced funding. Meanwhile, sanctions should surely be awarded against the 46th CTC's counsel, MCR 2.114(E).

Ironically, the 46th CTC commenced this litigation entirely without standing to sue, to date with complete success, yet when Crawford and Kalkaska sought a judicial declaration that Otsego's actions put them in violation of the balanced budget requirement of MCL 141.421 *et seq.*, their counsel was severely punished for doing so without proper standing (see No. 128884).

difficulties in civil or criminal cases (1453a). The most they could say was that some of the 46th CTC's employees had to work hard to stay current (1420a).

That is not surprising, as the dispute concerns enhanced retirement benefits, which only affect, in the near term, employees who have ceased providing services to the 46th CTC. But to the extent expectations of current employees regarding being able to live comfortably in retirement are considered in accepting or continuing employment, the record is clear that the pre-existing benefits did not prevent the 46th CTC from fulfilling any aspect of its mandated constitutional or statutory responsibilities (1413a, 1453a, 1474a). Both prior to and after 2003, the 46th CTC retained an efficient, loyal, and dedicated staff, and was able to fill positions vacated by retirement, relocation, childbirth, or other standard causes of attrition[38]. There is no evidence that a single employee of the 46th CTC quit, or even threatened to quit, due to the insufficiency of pension or retiree health care benefits (1469a, 1492a).

Judge Davis did indicate that he thought the 46th CTC was barely competitive in attracting licensed social workers on the probate side, but the problem was one of wages, not benefits (1475a).[39]

At the end of the day, there is simply no evidence, and *a fortiori* a paucity of the requisite clear and convincing evidence, that the level of funding offered by the counties was insufficient to allow the 46th CTC to fulfill essential court functions. The evidence justifies only a contrary conclusion—that appropriations have and remain sufficient for the 46th CTC to fulfill all its mandated constitutional and statutory responsibilities. *Hillsdale, supra.*

---

[38] Moreover, making enhanced pension benefits retroactive does not aid the recruitment and hiring of new or replacement employees.

[39] In any event, nothing in the Complaint sought additional funding to raise the wages of licensed social workers employed by the 46th CTC, nor did Judge Davis claim he had any unfilled positions in that classification, or that his existing employees in that category were incompetent, inefficient, disgruntled, or otherwise not performing adequately.

Issue II: "With respect to the dispute over pension and health care benefits, what evidence supports the conclusion that these benefits were reasonable and necessary to achieve the court's constitutional and statutory responsibilities, and that the court's failure to obtain such benefits so affected employee morale, or the court's ability to retain or hire competent employees, that they were reasonable and necessary to achieve the court's constitutional and statutory responsibilities?"

Standard of Review

The standard of review for this issue is identical to that for Issue I.

Analysis

A. Reasonableness

The undisputed evidence shows that much wealthier counties, such as Oakland, offer much lesser benefits than the B-4. Oakland County, one of the top 5 affluent counties in the United States, offers its judicial and county employees only a defined contribution plan costing 9% of wages (1516a-1517a, 1518a, 1527a, 1531a), very close to the 8.5% cost of the B-2 plan that was being provided in Crawford and Kalkaska Counties (but 50% more than the 6% SEP plan being provided by Otsego). Grand Traverse County, one of Mr. Edel's "comparables", canceled its longevity payments (1530a). Meanwhile, many counties do not offer any retiree health care insurance or supplements; county employees in Crawford, Kalkaska and Otsego generally, other than law enforcement officers who are in no way comparably situated to judicial employees, have no retirement health care plan.

Moreover, the pre-existing B-2 plan in Crawford and Kalkaska was economically superior, by at least $33^{1}/_{3}\%$[40], to the defined benefit pension plan which employees of the Court of Appeals and Supreme Court, along with civil service classified employees generally, had between 1974 and 1997, after which new hires were offered only a defined contribution plan. Surely a retirement benefit equal to or better than what *higher* courts (with greater need for

[40] The 46th CTC's B-4 with E-2 COLA rider is far superior to the State's limited COLA benefit.

highly qualified *career* staff, including attorneys, and at least equal need for transient staff attorneys to serve as judicial clerks or entry-level research attorneys) cannot be deemed so inadequate as to render a legislative refusal to enhance the benefit unconstitutional. Any claim that a B-4 pension $66^2/_3\%$ superior to the state plan is "reasonable", and that a B-2 pension which is "only" $33^1/_3\%$ better than the state plan is thus "unreasonable", must be rejected as absurd.

B. Necessity

There is no evidence whatsoever of any problem retaining existing employees that is related to retirement benefits (1413a, 1453a, 1474a). While 36 employees of the 46th CTC left in a five year period, and 47 in a seven-year period, not one did so because of the asserted inadequacy of retirement benefits (1468a-1469a). If the number of employees fired (five in the first five years) seems high, the responsibility lies with those who did the hiring, training, and supervision—which is emphatically *not* the counties. *Judicial Attorneys Ass'n v State*, 459 Mich 291, 300-301 (1998). Nor are the counties responsible for employees who moved elsewhere, opted for motherhood over career, or sought greener pastures for any reasons other than the inadequacy of retirement benefits. Similarly, all staff positions in the 46th CTC are filled by competent and efficient personnel, including those, like probate court social workers, for whom the wages offered are supposedly not competitive. More than *ipse dixit* is needed to establish necessity by "clear and convincing evidence".

There is a complete void of evidence demonstrating that the retirement benefits for which Crawford and Kalkaska are willing to appropriate full funding does not allow the 46th CTC to function at a "serviceable level" per *Wayne Co Prosecutor, supra*:

> A serviceable level of funding is the minimum budgetary appropriation at which statutorily mandated functions can be fulfilled. A serviceable level is not met when the failure to fund eliminates the function or creates an emergency immediately threatening the existence of the function. A serviceable level is not the optimal level. A function

funded at a serviceable level will be carried out in a barely adequate manner, but it will be carried out.

Here, no function has been eliminated, nor is there, or has there ever been, an emergency immediately threatening the existence of any judicial function. *This dispute arises exclusively from the 46th CTC's insistence that it need not settle for adequate funding and is entitled, without qualification, to the best of everything, without regard to the counties' financial constraints.*

By his own admission, Judge Davis sought the best possible benefits irrespective of the costs[41]. But an "optimal level" of funding is not required—indeed, the Court of Appeals, trying to dig itself out of a multi-year backlog, will have to make do next year with lower staffing levels to deal with a $600,000 shortfall in funding, and it projects an increase in disposition time. Progress Report No. 15: Michigan Court of Appeals Delay Reduction Plan (Jan. 30, 2006), p. 16 (Attachment 4). It is impossible that the 46th CTC has a right to lavishly enhance employee benefits when its judicial superiors are willing to tighten their belts in a era of shrinking or static government revenues and exploding demands. In this instance, the testimony of Judge Davis and Mr. Edel demonstrates that the 46th CTC is operating in a more than adequate manner, able to provide non-mandated functions, like district court probation, in addition to fully satisfying all its mandatory responsibilities (1413a, 1453a, 1474a).

---

[41] During trial on June 18, 2003 (1494a), Judge Davis confirmed what he had said at his June 11, 2003 deposition. There, when asked if he investigated the cost of the enhanced benefits he sought, Judge Davis responded:

> It's very simple, Ms. Toskey. I want to say it again because it never gets more complicated than this. I never investigated anything. * * * [W]e want a better pension plan and by better I want the best there is * * *

Judge Kolenda then remarked mid-trial (1498a):

> Ms. Toskey, it's true the judge has said it was not of significance to him and he'd left that up to the counties. So doesn't that kind of answer the question universally? * * * He didn't know the cost when he proposed it. He didn't inquire.

In this case, no identifiable claim has ever been advanced by the 46th CTC that the counties have refused to fund enough positions—clerical, legal, probationary, etc.—to permit it to minimally fulfill its statutory responsibilities, or that the salaries for those positions are inadequate to attract qualified personnel. To the contrary, while Crawford's own employees were stuck in an ongoing wage freeze, the employees of the 46th CTC were enjoying consistent 4% *compounded* annual increases, far outpacing inflation (1968a-1969a).

In practical terms, the dispute here boils down to whether the pre-existing retirement benefit package—equal to that provided all other similarly classified county employees, and, with regard to pensions, *far superior* to any *ever* available to employees of the appellate courts—suffices to permit the 46th CTC to carry out its operational mandates at a "serviceable" level, or whether another massively more generous retirement and health care benefit plan, with *retroactive* benefits $33^1/_3\%$ higher than anything provided to other government employees in these counties, and fully $66^2/_3\%$ more than the best plan ever available to state appellate judicial employees, is absolutely *necessary* (even assuming it is *reasonable*) to *minimally* perform its mandated functions at a "serviceable" level. *Wayne Co Prosecutor v Wayne Co, supra.*

This Honorable Supreme Court has expressly held that a county does not underfund court operations when it refuses to transfer funding for an existing pension plan to another use preferred by the court's employees, *Employees & Judges of 2nd Judicial District Court v Hillsdale County, supra*, 423 Mich at 714. *A fortiori*, refusing to enhance an adequate pension plan (superior by $33^1/_3\%$ to the best ever afforded to appellate judicial staff in Michigan) can hardly be unconstitutional.

The Complaint thus fails to cognizably plead, *Dacon v Transue*, 441 Mich 315, 329-330 (1992); MCR 2.111(B)(1), any facts establishing Crawford County or Kalkaska County

appropriated funds for 46th CTC operations for the fiscal years 2001-2003 below the "serviceable" level which is both reasonable and necessary to allow the 46th CTC to *minimally* carry out its statutorily mandated functions. *Hillsdale*, 423 Mich at 717-719. Nor has there been any such showing by the proofs presented in the trial phase of this case.

Notably, reported post-*Wayne Circuit Judges v Wayne Co* judicial funding lawsuits have mostly[42] run aground on the shoals of the key criterion of necessity. Thus, in *Employees & Judges of 2nd Judicial District Court v Hillsdale County, supra*, this Court, although assuming that the 4% salary increase which the district court had granted to its employees—to replace an identical supplement paid by the county under a prior retirement plan and still being paid to non-judicial employees—was reasonable, nonetheless found that such increase was not *necessary* to maintain judicial operations at the requisite minimum level, where actually paying the higher salaries would cause the district court's budget to exceed its appropriations. 423 Mich at 722.

To like effect is *Ottawa County Controller v Ottawa Probate Judge, supra*, where the probate judge sought to pay a trifling 0.6% salary increase to certain non-union employees, which would have caused the probate court to exceed its legislatively budgeted appropriations. Although recognizing that the judiciary has the constitutionally exclusive prerogative of fixing salaries and benefits for judicial employees, 156 Mich App at 603-604, the Court of Appeals rejected the probate court's demand for funding to cover the salary increase at issue as not being *necessary* to fulfill a statutorily-mandated judicial function. *Id.* at 600.

---

[42] The sole exception is *17th District Probate Court v Gladwin County Bd of Comm'rs, supra*, where *undisputed* evidence established that the salary structure utilized by the county (1) was irrational, (2) had caused ill will and hurt morale among judicial employees, and (3) the higher salaries sought by the probate courts in each of two counties were both reasonable *and necessary* to sustain statutorily-mandated judicial operations. 155 Mich App at 445, 449, 455-458.

A number of related cases affirm that the judiciary has the sole prerogative to set the salaries and benefits of judicial employees, whether by collective bargaining or otherwise, but only *within the appropriations made by the legislative branch. Livingston County v Livingston Circuit Judge,* 393 Mich 265, 274 (1975); *Judicial Attorneys Ass'n v State, supra.* Indeed, judicial employees cannot enforce contracts for salaries or benefits that would cause a court to exceed its appropriations, unless they prove that any overage satisfies the twin requirements of reasonableness *and necessity. Branch County Bd of Comm'rs v Service Employees Int'l Union, Local 586, supra*, 168 Mich App at 349 ff.

This record demonstrates beyond peradventure that neither reasonableness nor necessity has remotely been proved in this case based on "clear and convincing evidence".

C. Employee Morale, Retention and Hiring

As the Statement of Facts reflects, there is no empirical evidence that the morale of employees ever interfered with the 46th CTC's ability to fulfill its mandated functions (1413a, 1453a, 1474a). The evidence is entirely to the contrary, with both Judge Davis and Mr. Edel expressly stating, without contradiction, that by the year 2000 employee morale was excellent. There is no evidence that morale ever declined subsequent to 2000, still less that any such decline was a direct function of inadequate retirement benefits or threatened judicial operations.

The entire "morale" theory is an afterthought, nowhere identified in the Complaint, but helpfully suggested by Judge Kolenda and carried forward from there by counsel for the 46th CTC. The only testimony concerning "morale" is circular—employees were efficient, productive, competent, dedicated, loyal, and satisfied in 2000. However, once Judge Davis promised employees enhanced benefits he could not deliver, the 46th CTC has claimed that to now inform employees they cannot have enhanced benefits will destroy morale. Indeed, but for

Judge Davis' action of unilaterally issuing his "implementation order 2000-11" on December 4, 2000 (1703a-1704a)[43]—despite acknowledging that Crawford had yet to agree to any enhanced benefits (*Id.*, ¶3)—employees of the 46th CTC would not have had their hopes prematurely raised and thus not face later disappointment if the ensuing litigation does not end in favor of forcing the counties to pay enhanced benefits they cannot afford and have not approved.

It cannot be doubted that employees as a group are happier if, like manna from heaven, higher wages or better benefits are simply bestowed upon them, or that, when the manna ceases to fall or becomes mundane, dissatisfaction may result. Numbers 11:4[44]. But this kind of bootstrapping, see *Allstate Ins Co v Comm'r of Insurance*, 195 Mich App 538, 550 (1992), is a circular argument that cannot be used by the judiciary to usurp the legislative power, as reflected in cases holding that, although a court may have collectively bargained with represented employees for a wage and benefits package, no enforceable contract arises until the funding authority appropriates the funds to implement the agreement. *Employees and Judges of 2nd Judicial Dist Ct, 2nd Div v Hillsdale County, supra*, 423 Mich at 719-720; *Livingston County v Livingston Circuit Judge*, 393 Mich 265, 274 (1975); *Judicial Attorneys Ass'n v State*, *supra*.

To accept the notion that the prospect of disappointment resulting when pie-in-the-sky promises collide with reality will suffice to evade the legislative power of the purse means that no court is ever required to spend within appropriations. All that needs to be done is promise the judicial employees more, claim they will be unhappy when they learn their enhanced benefits

---

[43] Of course, issuing such an administrative order at all was clearly improper. *Hillsdale, supra*, 423 Mich at 723; MCR 8.112(B)(1).

[44] "The rabble that was among them cultivated a craving, and the Children of Israel also wept once more, and said, 'Who will feed us meat? We remember the fish that we ate in Egypt free of charge, and the cucumbers, melons, leeks, onions and garlic. But now, our life is parched, there is nothing; we have nothing to anticipate but the manna!' " English translation by Rabbi N. Scherman, *The Stone Edition Chumash* (Artscroll Series, 1994).

will not be forthcoming, then sue the funding units to force them to honor a promise the court had no legal right to make. Yet the case law is clear: judicial employees have no legitimate expectation regarding even collectively-bargained wage and benefit levels *unless and until the funding unit makes an appropriation sufficient to that end.* *Ottawa Co Controller v Ottawa Probate Judge*, 156 Mich App 594, 600-601 (1986); *Employees and Judges of 2nd Judicial Dist Ct, 2nd Div v Hillsdale County, supra*, 423 Mich at 722.

Nor does a series of conclusory assertions that morale would be "destroyed" if enhanced benefits once promised were withheld satisfy the "reasonable and necessary" test of *Wayne Circuit Judges, supra*. As was held in *Branch County Bd of Comm'rs v Service Employees Int'l Union, Local 586*, 168 Mich App 340, 351-353 (1988) (emphasis added)

> At trial, District Judge Coyle testified that a competent, dedicated, efficient staff was needed in order to deliver quality judicial services. He acknowledged that his current staff possessed these attributes and could be described as "excellent." He also acknowledged that the turnover of staff members was "not substantial." Judge Coyle expressed concern, however, that the relative stability of his staff could change if the proposed wage increases were not implemented. On the other hand, O. William Rye, the board's expert on wage and classification matters, testified that the terms of the collective bargaining agreement were neither reasonable nor necessary. This conclusion was based on empirical data generated from Rye's detailed comparisons of the relevant wages as increased by the collective bargaining formula with wages paid in district courts of other counties and with comparable positions within Branch County and its courts. Rye's conclusion was not disputed by the witness from the State Court Administrative Office, who merely presented a "classification listing" and did not express any opinion regarding the reasonableness or necessity of the proposed wage increases. Indeed, that witness noted that the district court employees in this case generally "fared fairly well" regarding wages when compared to employees in comparable district courts and to employees of other trial courts in Branch County.
>
> In light of the testimony elicited at trial, we agree with the circuit court that there was not an adequate showing of necessity to justify the wage increases. That court observed that "[t]here is no evidence that the court will function less efficiently without [the proposed salary and benefit increases], that a strike will withhold services, [or] that employees may leave...." Thus, the present case is distinguishable from *Gladwin Comm'rs, supra,* in which we found no abuse of discretion in a trial court's finding that necessity and reasonableness were shown where an expert witness (who, by the way, was O. William Rye) testified that the compensation structure was unfair, inequitable, and

totally irrational because it paid most employees at the same rate, regardless of position or responsibility. **Moreover, in that case, the probate judge who testified at trial stated that the sums requested in excess of the appropriated amount were reasonable and necessary in order to end a morale problem among employees who had protested to him on a number of occasions, both in writing and orally, regarding their wages**.

Accordingly, we hold that the proposed wage increases in this case, which originally appeared as causing the district court's budget to exceed its overall appropriations for 1983, were not shown to have been necessary for the performance of the district court's statutorily mandated functions. **The district court therefore lacked the authority to increase the wages based on the collective bargaining agreement.** In addition, we note that the district court's administrative order compelling payment of funds to the two nonunionized employees is invalid. Payment of such funds, which appeared to have caused the court's overall appropriation to be exceeded, may not be compelled by way of an administrative order, but, rather, must be sought by way of a lawsuit at which the court has the burden of proving that such payment is necessary to the performance of its statutory functions. *Hillsdale Co., supra,* 423 Mich p. 722; *Ottawa Co, supra,* 156 Mich App pp. 599-600.

In this case, *a fortiori*, the evidence is undisputed that the current staff of the 46th CTC is "excellent", and has been able, without exception, to fulfill not only mandated functions, as well as to fund non-mandated functions (*e.g.*, district court probation, full-time law clerk). Nothing suggests that employee turnover in the 46th CTC has been unusual, and when the reasons for departures are examined in detail, it eventuates that retirement benefits have *never once* been a motivating factor. Meanwhile, all positions, even those claimed to have "non-competitive" wages, are fully staffed by competent personnel. And here, identically to *Branch Co*, Mr. Todd, after comparing wages and benefits of employees of the 46th CTC with those of employees of other courts, concluded the enhanced benefits are neither reasonable nor necessary. Again *a fortiori*, employees of the 46th CTC have done much better than "fare rather well" as compared with employees of the three counties comprising the 46th circuit, enjoying consistent, annual 4% wage increases (cumulating in excess of 33% from 1996-2002, 1994a-1990a) while Crawford employees endured a four-year wage freeze (1968a, 1969a).

The notion that "morale" may warrant invoking the "inherent powers" doctrine to override a legislative decision by duly elected representatives comes from *Seventeenth District Probate Court v Gladwin Co Bd of Com'rs, supra,* 155 Mich App at 454-455, cited and properly distinguished in *Branch Co, supra.* In *Gladwin*, "morale" was not *subjectively* determined based on an unfulfilled and legally unauthorized promise, but *objectively* grounded in an arbitrary and irrational wage structure whereby judicial employees with college degrees were paid the same as those with high school educations or less, without regard to position or job responsibility.

Here, in contrast, the 46th CTC has made no issue of wages or classifications, and it has received sufficient appropriations to pay 100% of the wages it has approved for each position, including annual 4% increases denied to county employees in the same circuit. Indeed, the 46th CTC has been generous to a fault in that regard, paying the circuit judge's secretary a salary of $45,883.00 in 2003, more than the Kalkaska County Clerk, Register of Deeds, Treasurer and County Controller, and higher than all elected officials in Crawford County except the Prosecutor and Sheriff, higher than all appointed departments heads in Crawford County, and higher than the salary of Crawford's Controller (1706a, 1712a-1714a) (although both Crawford's and Kalkaska's Controllers are college-educated accountants). The 46th CTC Co-Administrator, Mr. Edel, oversees only half of a $3.4 million budget, and receives a salary of $76,500.00; in contrast, Kalkaska County's Controller oversees a budget twice as large at a salary less than half that amount, a combined 4-1 disparity.

Mr. Edel under the MERS B-4 plan will enjoy a retirement windfall of $223,637 due to retroactivity (1932a), and his sister, also employed by the 46th CTC, anticipates a windfall of

$93,946 (*Id.*)[45]. Clearly, a retroactive retirement benefit increase is not only unnecessary to attract or retain qualified employees, it actually encourages or makes it possible for existing employees to retire sooner, thus accelerating the need to replace them.

There is simply no evidence in the record that the 46th CTC has been unable either to retain employees due to inadequate retirement benefits, or to recruit and hire replacements as the need arises. Even as to probate court social workers, the ostensibly non-competitive wages (which are in any event not at issue) available have not inhibited the 46th CTC from filling all such positions with qualified and competent personnel.

Issue III: "Whether Crawford County entered into a contract with the 46th Circuit Court to fund pension and health care benefits at a specific level?"

Standard of Review

In part, the contract issues come before the Court from summary disposition [Judge Kolenda having ruled summarily on May 30, 2003 (8a-32a) that Crawford's August 29, 2000 resolutions created a binding contract with the 46th CTC to fund the enhanced benefits, and having refused to give any effect to both Crawford's (1850a-1851a) and Kalkaska's (1840a, 1844a) rescinding resolutions]. All issues arising on summary disposition are reviewed de novo on appeal. *First Pub Corp v Parfet,* 468 Mich 101, 104 (2003).

---

[45] Those figures come from a recalculation by Mr. Todd done on March 13, 2002. On May 12, 2002, Mr. Todd, after learning from MERS that his initial figures did not include the automatic COLA benefit ("MERS E-2") the 46th CTC also intended to provide as part of the B-4 pension, recalculated those numbers. Based on the May 7, 2002 corrected MERS data, Mr. Edel's retirement account value increased to $316,743.00, his sister's (Sandra Bosman) to $142,442.00, representing differences of $223,637.00 and $93,948 from the value of their SEP assets (1200a; 1930-1932a). Moreover, the total unfunded liability that resulted from changing Otsego judicial employees to the retroactive B-4 (which Otsego intends to pass on, pro rata, to Crawford and Kalkaska) is $1,202,737.82 (*Id.*). The total unfunded liability for all three counties resulting from the switch to a retroactive B-4 with COLA is $1,388,808.49 (*Id.*).

In other respects (*e.g.*, whether Kalkaska, by its resolution, intended to be bound to any contract if Crawford were not participating), whether a contract can arise or has arisen by the action of a legislative body is a question of law subject to de novo review. *Studier v MPSERB*, 472 Mich 642, 660 (2005); *Atlas v Wayne Co Bd of Auditors,* 281 Mich 596, 599 (1937). There is a strong presumption that legislative action does not create contract rights, and in order for a legislative act to form the basis of a contract, the legislative language "must be 'plain and susceptible of no other reasonable construction' than that the Legislature intended to be bound to a contract." *Studier, supra*, at 660-661. Moreover, the Court must "proceed cautiously both in identifying a contract within the language of a [legislative act] and in defining the contours of any contractual obligation." *Id.* at 662. There should be special reluctance to find a contract where the legislative body has not precluded amendment of any employee benefit plan, such as a pension or health care. *Id.* at 662-663. There can be no implied contracts resulting from legislative action. As held in *Studier, supra*, at 661-662 (emphasis added):

> [T]o construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. Indeed, **" '[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.' "** *Keefe v Clark,* 322 US 393, 397; 64 S Ct 1072; 88 L Ed 1346 (1944) (quoting *Charles River Bridge v Warren Bridge,* 36 US (11 Pet) 420, 548, 9 L Ed 773] (1837)).

Thus, absent an express contract, the contract claim collapses.

Additionally, counties are limited by statute with respect to entering into inter-governmental contracts. Counties are only authorized to enter into "necessary" contracts, MCL 45.3[46], while restricted in entering into long term contracts, MCL 46.11b(1), MCL 46.11(o), MCL 46.175a, and intergovernmental contracts, *e.g.*, MCL 124.2 (joint facility operations);

[46] As other counties and courts have operated since 1837 without such funding contracts, as Mr. Edel acknowledged (1442a), such a contract is hardly "necessary" in any sense of the word.

MCL 124.3 (heat, power, and light utilities); MCL 124.532 (transfer of functions or responsibilities); MCL 333.2448 (health jurisdictions or functions). By the principle of *expressio unius est exclusio alterius*, *Stowers v Wolodzko*, 386 Mich 119, 133 (1971), in the absence of a statute explicitly so providing[47], a county lacks authority to enter into any contract for retirement benefits with a government judicial entity, still less a long term one. Thus, even if Crawford, Kalkaska and Otsego wished to make such a contract, they lack the statutory authority necessary to do so. As this Court held in *Sittler v Bd of Control of Eastern Mich College of Min & Tech*, 333 Mich 681, 686-687 (1952):

> It follows that plaintiff did not possess a contract under which he could assert rights. Even the letter written by Professor Bennett does not purport on its face to be a contract. We are mindful that it appears in plaintiff's opposition to the motion to dismiss that on other occasions heads of departments have hired assistant teachers; but such usage or custom, if it ever prevailed, cannot be availed of to enlarge the statutory powers of the board of control so as to include or justify acts which are unauthorized and contrary to the applicable statutory law. See Annotations 65 ALR 811; which includes *Hoffa v Saupe*, 199 Iowa 515 (202 NW 234).
>
> "The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority." *Township of Lake v Millar*, 257 Mich 135, 142; 241 NW 237, 240.
>
> See, also *Vincent v Mecosta Supervisors*, 52 Mich 340; 17 NW 938; *Schneider v City of Ann Arbor*, 195 Mich 599; 162 NW 110.

Nor can plaintiff pay for benefits in excess of appropriations, even if bargained for with its employees, *Ottawa Co Controller v Probate* Judge, supra, 156 Mich App at 603-604; *Judges of the 74th Judicial District v Bay Co, supra,* 385 Mich at 724. No statute authorizes a contract in

---

[47] See *Twp of Chestonia v Twp of Star*, 266 Mich App 423, 430 (2005) (statutory authority authorizing two neighboring townships to contract had to be identified at outset before valid contract could exist; only because the contract itself limited the parties' ability to terminate the relationship was there a basis for enforcing the contract). Here, challenged to identify any statute authorizing a contract between a court and its funding unit over future appropriations, plaintiff's counsel at oral argument in the Court of Appeals conceded he could not do so, and that he was relying on the notion that counties can make any contract not prohibited by law, rather than only those permitted by law. (1660a-1661a).

perpetuity—Judge Davis' proposed contract indicated it would be in force without any limitation as to time (1686a, Part IV, ¶C)—under any circumstances[48].

Note that the limited power of counties to make contracts is not an affirmative defense, but is an inherent aspect of municipal government that is not subject to a waiver analysis, *Mack v City of Detroit*, 467 Mich 186, 197-203 (2002), and anyone dealing with a county or other municipality must at their peril take notice of the limitations on the county's powers and authority, *Johnson v City of Menominee*, 173 Mich App 690, 693-694 (1988); see also *Roxborough v Michigan Unemployment Compensation Comm'n*, 309 Mich 505, 511[49] (1944) and plead in avoidance of those inherent limitations, *Mack ,id.*

Thus, where as here established legal doctrines *or statutes* limit whether a contract can or does arise, the existence of a contract, *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 569 n. 7 (1999), as well as its construction and application, *Bandit Industries, Inc v Hobbs Int'l, Inc,* 463 Mich 504, 511 (2001); *Perry v Sied,* 461 Mich 680, 681, n 1 (2000), present issues of law reviewed de novo on appeal.

---

[48] The proposed contract did contain a section providing that the parties could modify the contract in writing, but such a clause is legally meaningless, as the parties who can make an initial valid contract can always make a new contract, and cannot deprive themselves of the power to do so. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 371 (2003), quoting *Reid v Bradstreet Co*, 256 Mich 282, 286 (1931).

[49] The Court there held:

> At the time plaintiff accepted his appointment as a member of the appeal board, he was chargeable with knowledge of the limitation on the governor's authority to bind the State to pay him a fixed annual salary. In 59 C.J. p. 173, § 287, it is stated: "The powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred."

Exactly the same principle applies *a fortiori* to counties, which have no inherent powers, and can exercise only those powers delegated by statute or expressly granted by the Constitution. Const 1963, art 7, §1; *Wright v Bartz*, 339 Mich 55, 60 (1954), citing *Bond v Cowan*, 272 Mich 296, 298 (1935); *Alan v Wayne Co*, 388 Mich 210, 245 (1972).

Interpretation of a municipal ordinance or resolution is also reviewed *de novo* on appeal as a question of law. *Soupal v Shady View, Inc*, 469 Mich 458, 462 (2003), citing *Gora v City of Ferndale, supra*, 456 Mich at 711. Additionally, in that regard the municipality's interpretation of its own enactments must be given judicial deference. *Macenas v Village of Michiana*, 433 Mich 380, 398 (1989).

A Note on Separate and Joint Defenses on the Contract Issue

In this one respect, Crawford and Kalkaska have somewhat differing relevant facts. Crawford, for its part, never signed any contract. Crawford is claimed to have entered into a contract based on its August 29, 2000 resolutions, which it later rescinded (1849a-1850a), while Kalkaska actually signed a written agreement, which it also later rescinded (1844a). Accordingly, as to the issue as framed by the Court, Crawford and Kalkaska will first address their separate defenses (Issues III and IV), then their collective defenses (Issue V).

Analysis

A. As a matter of law, Crawford's August 29, 2000 resolutions did not constitute a contract

Crawford's resolutions of August 29, 2000, which approved retiree health care on conditions rejected by the 46th CTC, and which tabled the proposed B-4 pension plan, requesting that the 46th CTC merely "recognize" the B-4 in its next budget submission, cannot be construed as having contractually approved the *immediate* implementation of *both* disputed benefits. Crawford expressly declined to approve the B-4 request (which by its terms was to commence in FY 2003) for FY 2000 or 2001, and even if "recognition" for accounting purposes is erroneously conflated with actual appropriation of funds[50]—which by law requires a separate resolution,

[50] Of course, in context "recognize" was used in its accounting sense as asking for presentation of a budget for the next fiscal year showing what the actual expense of a B-4 pension plan would be. Given that the preceding discussion, as reflected in the official minutes of the meeting,

MCL 141.436 and 141.437—the 2000 Crawford Board could not thus tie the hands of the 2001-2002[51] Crawford Board as to future budget years. *City of Hazel Park v Potter*, 169 Mich App 714, 719-720 (1988). As to retiree health care, Crawford's conditions were flatly rejected.

These precise points have now been settled beyond peradventure in favor of the position of Crawford and Kalkaska. In *Studier v MPSERB, supra,* 472 Mich at 660 ff, reaffirming and extending *Atlas v Wayne Co Bd of Auditors, supra*, 281 Mich at 599, this Honorable Supreme Court adopted the position of Crawford that resolutions cannot create a contract without explicit language to that effect. Addressing the contention that MCL 38.191(1), which provides for retiree health care benefits for members of the Public Schools Retirement System, created a contract that could not be repealed or altered unilaterally by virtue of Const 1963, art 1, §10 and US Const, art I, §10, the *Studier* Court, 472 Mich at 660-665, held that legislation which does not use explicit contractual language cannot be construed to create a contract (emphasis added):

> Although this venerable principle that a legislative body may not bind its successors can be limited in some circumstances because of its tension with the constitutional prohibitions against the impairment of contracts, thus enabling one legislature to contractually bind another, *Winstar, supra* at 872-874, **such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments**, *id.* at 874-875. A necessary corollary of these limitations that has been developed by the United States Supreme Court, and followed by this Court, is the **strong presumption that statutes do not create contractual rights**. *Nat'l R Passenger Corp v Atchison, Topeka & Santa Fe R Co,* 470 US 451, 465-466; 105 S Ct 1441; 84 L Ed 2d 432 (1985); *In re Certified Question (Fun 'N Sun RV, Inc v Michigan),* 447 Mich 765, 777-778; 527 NW2d 468 (1994). This presumption, and its relation to the protection of the sovereign powers of a legislature, was succinctly described by the United States Supreme Court in *Nat'l R, supra* at 465-466:

---

concerned Judge Davis' failure to offer any actuarials validating his cost representations, it made sense to demand that he present for future consideration a budget showing the actual (meaning actuarially determined), not projected, cost of a B-4 pension plan—as MERS itself requires.

[51] County Boards of Commissioners hold office for 2 year terms. MCL 46.410. At the general election in November, 2000, all Crawford and Kalkaska commissioner positions were up for election. Even if the all commissioners were re-elected, for purposes of their right to have a free hand as to subsequent budgets, each must be considered as if newly elected as of January 1, 2001. *Attorney General v Riley*, 417 Mich 119, 156-158, 164, 169, 204, 222-223 (1983).

For many decades, this Court has maintained that **absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise."** *Dodge v Board of Education,* 302 US 74, 79; [58 S Ct 98; 82 L Ed 57] (1937). See also *Rector of Christ Church v County of Philadelphia,* 24 How 300, 302 [65 US 300; 16 L Ed 602] (1861) ("Such an interpretation is not to be favored"). This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel Anderson v Brand,* 303 US 95, 104-105; [58 S Ct 443; 82 L Ed 685] (1938). Policies, unlike contracts, are inherently subject to revision and repeal, and **to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body**. Indeed, " **'[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.**" ' *Keefe v Clark,* 322 US 393, 397; [64 S Ct 1072; 88 L Ed 1346] (1944) (quoting *Charles River Bridge v Warren Bridge,* 11 Pet 420, 548 [36 US 420; 9 L Ed 773] (1837)). Thus, **the party asserting the creation of a contract must overcome this well-founded presumption, *Dodge, supra,* at 79, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.**

The first step in this cautious procession is to examine the statutory language itself. *Nat'l R, supra* at 466. **In order for a statute to form the basis of a contract, the statutory language "must be 'plain and susceptible of no other reasonable construction' than that the Legislature intended to be bound to a contract.**" *In re Certified Question, supra* at 778; 527 NW2d 468, quoting *Stanislaus Co. v San Joaquin & King's River Canal & Irrigation Co.,* 192 US 201, 208; 24 S Ct 241; 48 L Ed 406 (1904). If the statutory language " 'provides for the execution of a written contract *on behalf of the state* the case for an obligation binding upon the state is clear." ' *Nat'l R, supra* at 466, quoting *Dodge, supra* at 78 (emphasis supplied in *Nat'l R*). But, **"absent 'an adequate expression of an actual intent' of the State to bind itself," courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party.** *Nat'l R, supra* at 466-467, quoting *Wisconsin & Michigan R Co v Powers,* 191 US 379, 386-387; 24 S Ct 107; 48 L Ed 229(1903). **In addition to the absence of contractual language, some federal courts, when interpreting statutes involving public-employee pension benefit plans, have expressed even greater reluctance to infer a contractual obligation where a legislature has not explicitly precluded amendment of a plan.** *Nat'l Ed. Ass'n-Rhode Island v Retirement Bd. of the Rhode Island Employees' Retirement System,* 172 F3d 22, 27 (C.A.1, 1999). **This reluctance stems not only from the caution against finding an implied surrender of legislative power, but also from the realization that legislatures frequently need to utilize that power to modify benefit programs and compensation schedules.** *Id.* **Further, this reluctance is grounded in the realization that "it is easy enough for a**

statute explicitly to authorize a contract or to say explicitly that the benefits are contractual promises, or that any changes will not apply to a specific class of beneficiaries (*e.g.*, those who have retired)." *Id.* at 27-28 (citations omitted). In the area of worker's compensation, this Court has also followed this principle and stated that, as a general rule, a statute will not be held to have created contractual rights "if 'the Legislature did not covenant not to amend the legislation." ' *In re Certified Question, supra* at 778; 527 NW2d 468, quoting *Franks v White Pine Copper Div,* 422 Mich 636, 654; 375 NW2d 715 (1985). Finally, in addition to the absence of such clear and unequivocal statutory language, the circumstances of a statute's passage may "belie an intent to contract away governmental powers." *Nat'l R, supra* at 468.

The plaintiffs in this case have failed to overcome the strong presumption that the Legislature did not intend to surrender its legislative powers by entering into a contractual agreement to provide retirement health care benefits to public school employees when it enacted MCL 38.1391(1). Nowhere in MCL 38.1391(1), or in the rest of the statute, did the Legislature provide for a written contract on behalf of the state of Michigan or even use terms typically associated with contractual relationships, [FN21] such as "contract," "covenant," or "vested rights." [FN22] **Had the Legislature intended to surrender its legislative powers through the creation of contractual rights, it would have expressly done so by employing such terms**. Indeed, by its plain language, the statute merely shows a policy decision by the Legislature that the retirement system pay "the entire monthly premium or membership or subscription fee" for the listed health care benefits on behalf of a retired public school employee who chooses to participate in whatever plan the board and the Department of Management and Budget authorize. However, **nowhere in the statute did the Legislature** require the board and the department to authorize a particular plan containing a specific monthly premium, membership, or subscription fee or, alternatively, **explicitly preclude the board and the department from amending whatever plan they authorize.** [FN23] Additionally, nowhere in the statute did the Legislature require the board and the department to authorize a plan containing specified deductibles and copays. In fact, nowhere in the statute did the Legislature even mention deductibles and copays. Further, **nowhere in the statute did the Legislature covenant that it would not amend the statute to remove or diminish the obligation of the MPSERS to pay the monthly premium, membership, or subscription fee; nor did it covenant that any changes to the plan by the board and the department, or amendments to the statute by the Legislature, would apply only to a specific class or group of public school retirees.** [FN24] **Again, had the Legislature intended to surrender its power to make such changes, it would have done so explicitly**.

FN21. *Nat'l R, supra* at 467.

FN22. It is clear that the Legislature can use such nomenclature when it wishes to. For instance, when enacting 1982 PA 259, which requires the state treasurer to pay the principal of and interest on all state obligations, the Legislature provided in MCL 12.64: "*This act shall be deemed a contract* with the holders from time to time of obligations of this state." (Emphasis added.) Similarly, when enacting the State Housing Development Authority Act, 1966 PA 346,

the Legislature provided in MCL 125.1434: "*The state pledges and agrees* with the holders of any notes or bonds issued under this act, *that the state will not limit or alter the rights vested in the authority to fulfill the terms of any agreements made with the holders thereof, or in any way impair the rights and remedies of the holders* until the notes or bonds, together with the interest thereon, with interest on any unpaid installments of interest, and all costs and expenses in connection with any action or proceeding by or on behalf of such holders, are fully met and discharged. The authority is authorized to include this pledge and agreement of the state in any agreement with the holders of such notes or bonds." (Emphasis added.)

FN23. *Nat'l Ed Ass'n-Rhode Island, supra* at 27.
FN24. *Id.* at 27-28; *In re Certified Question, supra* at 778.

Exactly as the State Legislature, a municipal legislature cannot validly enter into a contract concerning essential governmental functions, such as budgeting, that extends beyond the term of office of the current members. *Atlas, supra.* As was held in *City of Hazel Park v Potter, supra*, 169 Mich App at 719-720[52]:

The general rule appears to be as follows:

"With respect to the power of a municipal council to enter, in behalf of the municipality, into a contract which will extend beyond the term for which the members of the council were elected, a distinction is drawn based upon the subject matter of the contract—whether legislative or governmental, or whether business or proprietary. Thus, where the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term, no power of the council so to do exists, **since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors.**

(Emphasis supplied.) The "general rule" was then adopted, 169 Mich App at 722.

[52] The *City of Hazel Park Case* overlooked *Atlas* and other existing Michigan authorities discussed in *Studier, supra.* However, *Hazel Park* nonetheless came to the correct conclusion based on reasoning entirely consistent with *Studier* and *Atlas.*

The *Potter* Court went on to quote with approval from *Newman v McCullough*, 212 SC 17, 25-26; 46 SE2d 252 (1948) (emphasis added):

> The *Newman* court expressed the rationale behind the majority rule: "It is therefore clear that council has no authority to make such contract extending beyond its term of office; that the **acts of former councils relating to the governmental functions of said councils which involve a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils**. The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit unimpaired to their successors. That acting as a governmental agency, it is bound always to act as trustee of the power delegated to it and may not surrender or restrict any portion of such power conferred upon it."

Accord: *Harris v City of Lansing*, 342 Mich 701, 708 (1955); *Willoughby v Village of Dexter*, 709 F Supp 781, 787 (ED Mich, 1989).

In this case, of course, every single position on the Crawford Board of Commissioners [and the Kalkaska Board likewise] was open for election (or re-election) at the general election in November, 2000, with new Boards taking office at noon on January 1, 2001. Const 1963, art 11, §2; MCL 46.410; *Attorney General v Riley, supra* (when a term of office ends, even if the same person has been elected to the next term, the two terms of office are entirely independent). Therefore, from noon on January 1, 2001 forward, Const 1963, art 11, §2, any purported contract to continue funding of augmented pensions, retiree health care, or other additional benefits for the 46th CTC became unilaterally terminable by Crawford County [and Kalkaska], unless affirmatively accepted by the successor Boards of Commissioners of Crawford and Kalkaska. Obviously, no such affirmative acceptance ever occurred, where both successor Boards of Commissioners actually rescinded their predecessors' prior resolutions (1844a, 1850a-1851a), which thus duly renounced any such purported contracts.

Here, nothing in either of Crawford's August 29, 2000 resolutions employed the explicit

phraseology necessary under *Studier* to create contractual rights or to bind successor Boards of Commissioners (even assuming *arguendo* that could have been done—see below the *ultra vires* argument as to Kalkaska, Issue III.B. 1), still less did either resolution preclude amendment or rescission of any of the referenced benefits by a subsequent Board of Commissioners. Nothing in either August 29, 2000 resolution explicitly precludes the Crawford Board from amending its action at any time.

Similarly, the claim by Judge Davis and Mr. Edel that a contract could be inferred from the failure of the counties to reject the enhanced benefits proposal out of hand, and from continued discussions of the concept, or implied from Crawford's adoption of the first August 29, 2000 resolution (as to retiree healthcare) with attendant conditions while supposedly aware of the true cost figures, is erroneous as a matter of law. *Studier*, 472 Mich at 662-663, precludes finding a binding contract based on mere inferences or implications of legislation, absent language clearly demonstrating an intent to surrender legislative power, such as "contract", "covenant", or "vested rights", *Studier, supra*, at 663-664, all of which terminology is conspicuously absent from either of Crawford's August 29, 2000 resolutions. Nor did Crawford "covenant not to amend the legislation", *Studier, supra*, at 663, quoting *In re Certified Question,* 447 Mich 765, 778 (1994), quoting in turn *Franks v White Pine Copper Div,* 422 Mich 636, 654 (1985). And no municipal contract can rest in parol. *Horner v City of Eaton Rapids*, 122 Mich 117, 121 (1899).

As this Honorable Court further held in *Studier*, 472 Mich at 669-670 (emphasis added):

> * * * **what one legislature has done, pursuant to the majority sentiment at that time, a later legislature responding to the then majority can modify or undo. Deprived of this right, self-government is not just hollow, it is nonexistent.**
>
> Yet, as the United States Supreme Court has held and we have discussed in this opinion, when the Legislature enters into a contract, a subsequent legislature cannot

repudiate that contract. **It seems obvious that to read what is a contract too broadly swallows the right of the people to change the course of their governance**. This is the tension that we have attempted to address and thoroughly analyze, whereas the dissent has just blithely assumed that any benefit once conferred is a contract and cannot be altered. This is an ill-considered notion that in cases yet to be seen, but surely to be seen if this were to become the majority position, means that, for example, general assistance welfare benefits could not be altered, Medicaid would be frozen in its first enacted form, and, in short, any financial benefit would be unalterable.

This is not and surely cannot be our law. * * * **No one should be surprised that benefit battles are fought out in the Legislature**. On the contrary, those who could claim legitimate surprise would be our citizens who * * * would have lost, in the fog of a baffling contract analysis, the right to change the course of their government. Indeed, that would be more than surprising, it would be revolutionary.

This is precisely one of those "cases yet to be seen" where treating Crawford's two resolutions—the one expressing specific terms and conditions attending approval of retiree healthcare which the 46th CTC promptly and flatly rejected, the other merely asking that the issue of B-4 pensions be tabled for one year, and then be presented, if at all, with actuarially reliable cost figures (as required by MERS)—as creating binding, perpetual contracts, would make financial benefits unalterable, and would wreak havoc and probably impose bankruptcy on two counties, while concomitantly exempting the judiciary from competition for limited public resources controlled by the popularly-elected legislative branch. Self-government in Crawford and Kalkaska Counties would cease to exist, and the republican form of government guaranteed by US Const, art IV, would collapse, to be replaced by a judiciocracy. *Studier, supra.*

B. Even if Crawford's August 29, 2000 resolutions could otherwise be construed as creating a contract, there was no offer or acceptance sufficient to form a valid contract

Crawford County certainly never accepted any contract proffered by the 46th CTC. Crawford's two resolutions of August 29, 2000 constitute, as to retiree healthcare, either acceptance of a proposal the 46th CTC claims never to have made, or a counteroffer which the

46th CTC rejected[53]. A counteroffer is not an acceptance. *Spaulding v Wyckoff*, 320 Mich 329, 334-335 (1948); *Kamalnath v Mercy Mem Hosp Corp,* 194 Mich App 543, 548-549 (1992). Accordingly, an acceptance upon terms varying from those proposed, "is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested." *Harper Bldg Co v Kaplan,* 332 Mich 651, 656 (1952)[54].

---

[53] As presented to Crawford by Mr. Edel, the 46th CTC's healthcare projections called for a $50,000 per year deposit, increasing 4% per year, by the three counties (total) into a fund—to be created without complying with MCL 38.1213 (see Part III.C.5 below)—with a base Blue Cross/Blue Shield premium of $4,087 per two person family unit (418a at 420a). Crawford's first August 29, 2000 resolution incorporated those figures, but Judge Davis, that same evening, rejected those figures as incorrect. No subsequent resolution with premium figures corresponding to those substituted by Judge Davis was ever adopted by Crawford, still less at an Open Meeting by a majority of the Board. The written contract tendered to Crawford by Judge Davis had no upper limits on premium increases, and gave the Chief Judge absolute discretion to decide if such insurance should be modified. It also guaranteed retirees could receive no less than the amounts on attachment A to the contract as a credit toward health insurance.

Perhaps most telling is the fact that, in a letter dated September 25, 2000 (1689a), Judge Davis wrote to Crawford's Commissioner Hanson: "I cannot in good conscience order a change [in health plan] until I have a contract in place." That is plainly an admission that there was then no contract. Likewise, on September 29, 2000 (1694a), Judge Davis wrote to all three county chairpersons that "execution of the proposed Contract for wages and benefits for Court employees will be delayed for an indefinite period of time." Judge Davis reiterated that view in a November 21, 2000 letter (1698a), where he asserted the status of matters was "Otsego and Kalkaska Counties having accepted the plan and Crawford County still considering the matter." And his "implementation order 2000-11", acknowledged that Crawford had yet to agree to any enhanced benefits (1703a-1704a, ¶3).

[54] Judge Kolenda ruled on May 30, 2003 (20a-21a) that, because Crawford "knew" that the terms it included in its August 29, 2000 resolution as to retiree healthcare, even though predicated on cost assurances provided by the 46th CTC, were not realistic, Crawford had "accepted" the 46th CTC's proposal without the limitations as to premium expense specified in its resolution. That is equivalent to saying that if a salesperson proposes to you, "I can get you a new Cadillac for $5,000", and you respond, "It's hard to believe you can do that,, but OK, I'll pay $5,000 for a new Cadillac." Later the salesperson reports, "I got you the new Cadillac, and you owe me $50,000." You protest, but the salesperson responds, "Look, you know new Cadillacs sell for a lot more than $5,000, so you agreed to buy a Cadillac from me at the going price. We have a contract. Pay up." Such bizarre sophistry explains why, aside from the fact the de novo standard of review renders it superfluous, appellants have not wasted this Honorable Court's time by debunking Judge Kolenda's various pixilated pronouncements one by one.

As to both retiree healthcare and the B-4 pension plan, Crawford County never executed the written "contract" proffered by plaintiff on September 6, 2000, nor did the Crawford Board of Commissioners authorize its chairperson to sign that "contract", nor did she sign it. Without the chairperson's authorized signature (or that of an authorized deputy), Crawford County cannot be liable for any purported "contract", whatever interpretation is put on its August 29, 2000 resolutions. MCL 46.3(5) ("The board may designate 1 member to affix his or her signature to contracts . . . requiring the signature of the chairperson, if the chairperson is unable to do so . . .). In the absence of the requisite signature, no valid contract can arise. *Mitchell v City of Benton Harbor* (Mich App No 244508, Feb. 12, 2004), slip op. pp. 2-3 (Attachment 2 per MCR 7.215(C)(1)).

C. Crawford's August 29, 2000 resolutions cannot be deemed to create a contract, where the resolutions themselves limits their effect, and where the 46th CTC has sought to enforce the resolutions by disregarding those limitations

No agreement exists where the parties expressly state that they do not intend to be bound until a second writing or subsequent formalization is executed. *Foster v United Home Improvement Co*, 428 NE2d 1351, 1355 (Ind App, 1981); *International Shoe Co v Lacy*, 53 NE2d 636, 638 (Ind App, 1944) (*en banc*). More importantly, if either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract. Restatement of Contracts, 2d, § 27, comment b; *Angelo DiPonio Equipment Co v Highway Dep't*, 107 Mich App 756, 761 (1981).

Here, Crawford could not have approved the 46th CTC's budget request for a B-4 pension plan, even if it wanted to do so, because it never passed an appropriation resolution as required

by MCL 141.436 and 141.437. Moreover, where, as here, Crawford acts on a budget request, which is based on certain financial representations, and approves the request conditioned on the representations being correct (when the requesting agency knows the projections to be false, and immediately objects to the condition), no contract can arise where Crawford County can be deemed to have made an appropriation without such expressed limitations. In order for a contract to be formed, the acceptance must be unambiguous and in strict conformance with the offer. *Pakideh v Franklin Commercial Mortgage Group, Inc,* 213 Mich App 636, 640 (1995). Here, the 46th CTC immediately rejected the accompanying conditions, and thus there was never an acceptance of any "contract" by both parties. *EJS Properties, LLC v Ferguson* (Mich App No 242490, Feb. 12, 2004), slip op. pp. 2-3 (Attachment 3 per MCR 7.215(C)(1)).

D. If there was a valid contract, it could not be enforced beyond January 1, 2001

Any party dealing with public officials must at their peril take notice of the limitations on their powers and on their authority to bind the municipality. *Johnson v City of Menominee, supra*, 173 Mich App at 693-694. Here, independently of the obligation to transfer their legislative powers unfettered to their successors, counties cannot enter into long term contracts, except in limited circumstances specifically allowed by statute, *e.g.*, MCL 46.11b(1). The very existence of such a statute is proof positive that other such contracts as are claimed by the 46th CTC are *not* permitted. *Pittsfield Charter Twp v Washtenaw County*, 468 Mich 702, 712 ff (2003); *Hoste v Shanty Creek Mgt., Inc, supra,* 459 Mich at 572 n. 8 (1999) (discussing the principle of *expressio unius est exclusio alterius*).

Also independently precluding a contract from arising, no purported contract was ever signed by the Chair of the Crawford Board of Commissioners or a designated alternate with the prior approval of the Crawford Board, without which there can be no valid contract. MCL

46.3(5) ("The board may designate 1 member to affix his or her signature to contracts . . . requiring the signature of the chairperson, if the chairperson is unable to do so . . .). Crawford steadfastly refused to sign any version of a proffered "contract". In the absence of the requisite signature, no valid contract can arise. *Mitchell v City of Benton Harbor, supra*, slip op. pp. 2-3.

Further, a municipal legislature cannot validly enter into a contract concerning essential governmental functions, such as budgeting, that extends beyond the term of office of the current members. *City of Hazel Park v Potter, supra*, 169 Mich App at 719-720; *Newman v McCullough, supra*, 212 SC at 25-26: *Harris v City of Lansing, supra*, 342 Mich at 708; *Willoughby v Village of Dexter, supra*, 709 F Supp 787.

Here, of course, every single position on both the Crawford and Kalkaska Boards of Commissioners was open for election (or re-election) at the general election in November, 2000, with new Boards taking office at noon on January 1, 2001. Const 1963, art 11, §2; *Attorney General v Riley, supra* (when a term of office ends, even if the same person has been elected to the next term, the two terms of office are entirely independent). Therefore, from noon on January 1, 2001 forward, Const 1963, art 11, §2, any purported contract to continue funding of augmented pensions, retiree health care, or other additional benefits for the 46th CTC became inoperative and unenforceable, unless affirmatively accepted by the successor Boards of Commissioners. Obviously, no such affirmative acceptance ever occurred, where both successor Boards of Commissioners rescinded their predecessors' prior pertinent resolutions.

It was therefore clear error for the lower courts here to enforce a purported contract for fiscal year 2001 and beyond, when the successor boards of commissioners of Crawford and Kalkaska Counties are unfettered by any such ostensible agreement entered into by a predecessor board. Thus, even assuming arguendo that there was a valid contract by virtue of Crawford's

August 29, 2000 resolution, after January 1, 2001, that contract became unilaterally terminable at will by Crawford (which had the option instead of ratifying it to January 1, 2003), and unless the inherent powers claim (Count IV) requires funding of the MERS B-4 pension plan or the retiree health care plan at the appropriation levels demanded by the 46th CTC, Crawford and Kalkaska Counties have no contractual obligation to appropriate such funds.

See also Part III.C.2. below for discussion of a closely related argument.

E. The 46th CTC admitted on multiple occasions subsequent to August 29, 2000 that there was no extant contract with Crawford County as to any enhanced benefit

Contradicting the notion that the Crawford August 29, 2000 resolutions gave rise to a contract, in a September 29, 2000 letter addressed to all three counties, Judge Davis stated that "execution of the proposed Contract for wages and benefits for Court employees will be delayed for an indefinite period of time." (1694a). That statement totally belies any possible claim that there was already some kind of contract in existence covering those benefits.

Similar admissions were made by Judge Davis in a September 25, 2000 letter (1689a) and in December 4, 2000 "implementation order #2000-11" (1703a-1704a, ¶3). Likewise, in a November 21, 2000 letter, Judge Davis reported that "Crawford County [is] still considering the matter" (1698a).

Issue IV: "Whether Kalkaska County entered into a[n enforceable] contract with the 46th Circuit Court to fund pension and health care benefits at a specific level?"

Standard of Review

The standard of review applicable to Kalkaska is identical to that for Crawford, Issue III above, pp. 36-40.

Analysis

A. The written contract signed by Kalkaska in October, 2000 is *ultra vires* and unenforceable, or alternatively was binding only on the then-existing Kalkaska Board of Commissioners and therefore validly revoked by the successor Board in December, 2001

Counties have no inherent powers, but function solely on the basis of statutorily-delegated powers. *Wright v Bartz, supra*, 339 Mich at 60; *Bond v Cowan, supra,* 272 Mich at 298. A municipality cannot be bound by a contract not authorized by statute. *Lasky v City of Bad Axe*, 352 Mich 272, 275-277 (1958).

Yet counties are limited by statute with respect to entering into inter-governmental contracts. Counties are only authorized to enter into "necessary" contracts, MCL 45.3, while restricted in entering into long term contracts, MCL 46.11b, MCL 46.11o, MCL 46.175a, and intergovernmental contracts, *e.g.*, MCL 124.2 (joint facility operations); MCL 124.3 (heat, power, and light utilities); MCL 124.532 (transfer of functions or responsibilities); MCL 333.2448 (health jurisdictions or functions). By the principle of *expressio unius est exclusio alterius*, *Stowers v Wolodzko, supra*, 386 Mich at 133, in the absence of a statute explicitly so providing[55], a county lacks authority to enter into any contract for retirement benefits with a government judicial entity, still less a long term one. Nor can plaintiff pay for benefits in excess of appropriations, even if bargained for with its employees, *Ottawa Co Controller v Probate*

[55] See *Chestonia Twp v Star Twp*, 266 Mich App 423, 430 (2005) (statutory authority authorizing two neighboring townships to contract had to be identified at outset before valid contract could exist; only because the contract itself limited the parties' ability to terminate the relationship was there a basis for enforcing the contract). Here, challenged to identify any statute authorizing a contract between a court and its funding unit over future appropriations, plaintiff's counsel at oral argument in the Court of Appeals conceded he could not do so, and that he was relying on the notion that counties can make any contract not prohibited by law, rather than only those permitted by law. (1660a-1661a).

Judge, supra, 156 Mich App at 603-604; *Judges of the 74th Judicial District v Bay Co, supra,* 385 Mich at 724.

Moreover, the "contract" drafted by the 46th CTC and signed by Kalkaska (and Otsego) violates Const 1963, art 3, §2 by purporting to delegate forever the counties' legislative authority over changes in benefits to the Chief Judge of the 46th CTC (1685a, ¶¶3-4). Such a relinquishment of power is unconstitutional and renders any ostensible contract illegal and void. As held in *Taxpayers of Michigan Against Casinos v State (On Remand)*, 268 Mich App 226, 237 (2005):

> We hold that the provision in the gambling compact between the state of Michigan and the Little Traverse Bay Bands of Odawa Indians that provides for amendment by the Governor without legislative approval violates Const. 1963, art. 3, § 2. Further, we hold that the exercise by the Governor without legislative approval of the amendatory provision in the gambling compact between the state of Michigan and the Little Traverse Bay Bands of Odawa Indians violated Const. 1963, art. 3, § 2. [FN6 omitted] The provision contained in the compact (and in the additional three compacts described in footnote 6 of this opinion) is void insofar as it grants amendatory power solely to the Governor without legislative approval.

Analytically, granting amendatory power solely to the Chief Judge without legislative approval suffers from the identical constitutional deficiency.

B. The nature of the written contract signed by Kalkaska was such that it could not go into effect unless all three counties executed it; Crawford's refusal to participate thus rendered Kalkaska's signature nugatory

As to Kalkaska, although it did sign the September 6, 2000 "contract", the essence of the "contract" was to unify the three counties' then-separate and independent health insurance and pension plans for court employees within their respective boundaries. Without the signatures of all four intended parties, even if otherwise valid, no contract binding the three actual signatories arose. *Young v Wallace*, 327 Mich 395, 403 (1950), citing *Ely v Phillips*, 89 W Va 580; 109 SE 808, 810 (1921), holds:

> The authorities are uniform in the holding that persons signing a contract prepared for signatures of other persons, to be affixed along with theirs, and intended to be signed by all of the parties named in it, are not bound until all have signed it, and incur no obligation, if any of those who were to have signed it refuse to do so. *Herndon v. Meadows*, 86 W Va 499; 103 SE 404, [405 (1920)]; Bean v Parker, 17 Mass 591, [604, 606 (1822)]; *Wood v Washburn*, [19 Mass 24;] 2 Pick (Mass.) 24 [1823]; *Howe v Peabody*, [68 Mass 556;] 2 Gray (Mass) 556 (1854); Russell v Annable, 109 Mass 72, [74,] 12 Am Rep 665 [1871].

Accord: *Beall v Jones*, 211 Ill App 336 (1918) (trial judge's finding that contract signed by fewer than all intended parties was binding on actual signatories held against clear weight of the evidence); *Hess v Lackey*, 191 Ind 107; 132 NE 257, 258 (1921); *DeBoer v Schneiderman*, 55 SD 505; 226 NW 735 (1929); *Davis v Phillips A Ryan Lumber Co*, 248 SW 448, 450 (Tex Civ App, 1923); *Peacock v Horne*, 159 Ga 707; 126 SE 813, 821 (1925).

The rule particularly applies where, as here, the "contract" itself reflects that all must participate or none (1669a). In this case, there was never any discussion suggesting that judicial employees in Otsego and Kalkaska would get retiree healthcare and a B-4 pension plan while those in Crawford would not; it was always all or none.

In that vein, note that Otsego's Board of Commissioners likewise unanimously approved a resolution that its assent would be invalid if Kalkaska and Crawford did not join in the contract (1270a). Moreover, the stated goal of Judge Davis was to have all the 46th CTC's personnel under a unified plan, and he threatened to cancel purported cost saving measures if all three counties did not sign on the dotted line (1564a). Having erroneously summarily concluded that Crawford's August 29, 2000 resolutions constituted an acceptance of a contract of some sort, Judge Kolenda compounded his error by finding that Kalkaska was bound irrespective of the rule of *Young v Wallace, supra.*

Issue V: "Whether Crawford County or Kalkaska County entered into a [valid] contract with the 46th Circuit Court to fund pension and health care benefits at a specific level?"

Standard of Review

The applicable standard of review applicable is identical to that for Issue III above, pp. 36-40.

Analysis

A. There was and could be no valid consideration to form a proper contract, where the counties' funding of judicial operations is the fulfillment of a pre-existing legal duty

In order to form a valid contract, there must be a meeting of the minds on all the material terms. *West Bloomfield Hospital v Certificate of Need Bd (On Remand),* 223 Mich App 507, 519 (1997). The burden is on the plaintiff to show the existence of the contract sought to be enforced by a preponderance of the evidence. *Kamalnath v Mercy Memorial Hospital, supra,* 194 Mich App at 549. Regardless of the equities in a case, there is no presumption in favor of the execution of a contract because contractual liability is consensual and the court therefore cannot make a contract for the parties when none exists. *Id.*

A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. *Heritage Broadcasting Co v Wilson Communications, Inc,* 170 Mich App 812, 818 (1988). Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract, nor does the mere expression of intention create a binding contract. *Id.*; *Purlo Corp v 3925 Woodward Ave*, 341 Mich 483, 487 (1954).

The Counties, in merely fulfilling their governmental responsibilities under applicable statutes to fund the operations of the local trial courts, as a matter of law provided no consideration that could furnish the key element of any contractual relationship. *Guilbault v*

Dep't of Mental Health, 160 Mich App 781, 784-785 (1987); see also *Brown v Considine*, 108 Mich App 504, 507 (1981) and *Green v Millman Bros, Inc*, 7 Mich App 450, 455 (1967). Because the three counties that comprise the 46th Circuit have, and at all relevant times had, a preexisting legal obligation to fund their trial court(s), whether one or more such counties "agreed" to fund a particular benefit for judicial employees or not is irrelevant. A pledge to undertake a preexisting statutory duty (funding local judicial operations) is not supported by adequate consideration, and there can thus be no legally enforceable "contract". *Yerkovich v AAA*, 461 Mich 732, 740-741 (2000); *Puett v Walker*, 332 Mich 117, 122 (1952); *General Aviation, Inc v Capital Region Airport Auth*, 224 Mich App 710, 715 (1997); *Alar v Mercy Memorial Hosp,* 208 Mich App 518, 525 (1995); see also *Powers v Peoples Comm Hosp Auth*, 183 Mich App 550, 554 (1990); *Penner v Seaway Hosp*, 169 Mich App 502, 510-511 (1988). Any reliance on a contract theory is doomed to failure.

Additionally, as a matter of fact, any purported "consideration" as to health care insurance was illusory as to Crawford, whose judicial employees were already on a PPO plan, and laughably inadequate as to all counties in terms of trading the pittance of longevity pay for the vastly expensive *retroactive* B-4 pension plan with its immediate massive underfunding liability. *Rose v Lurvey*, 40 Mich App 230, 234-235 (1972); *Gerycz v Zagalski*, 230 Mich 381, 384 (1925).

B. Crawford's and Kalkaska's resolutions of rescission validly terminated any contractual obligation that had arisen

Crawford and Kalkaska Counties each have such powers as are granted them by law. Const 1963, art 7, §1. That a county has statutory authority to amend its budget after initial adoption is clear; MCL 141.436(6) only limits amending acts by prohibiting any that result in estimated total expenditures to exceed corresponding revenues. Each legislative body is

specifically empowered to enact a deviation from an original appropriation as soon as it finds it necessary to do so. MCL 141.437 Only funds that are appropriated may be expended. MCL 141.439(1).

Here, both Crawford and Kalkaska rescinded their original (non-appropriating) resolutions of August 29 and October 10, 2000 (1665a, 1849a) on February 1, 2002 and December 11, 2001 (1844a, 1850a-1851a). To the extent the funds had not already been disbursed and expended, Crawford and Kalkaska were statutorily empowered to take this action. Thus, Judge Kolenda's refusal to recognize the validity of these rescissions must be reversed.

Moreover, per *Studier,* 472 Mich at 669-670, *Atlas,* and *Hazel Park, et al, supra*, neither Crawford nor Kalkaska could have bound a successor Board or fettered a successor Board's legislative discretion over budgetary and financial matters.

C. A valid contract could not be formed without the action of the Crawford or Kalkaska Board acting as a body

The 46th CTC has purported to treat as significant purported concessions made by the two chairpersons of the Boards of Commissioners of Crawford and Kalkaska counties (*e.g.*, Judge Davis claimed that Ms. Corlew, Crawford's chairperson, after learning of Judge Davis' "correction" of Mr. Edel's false cost projections, agreed that the health care resolution would stand based on the new figures—something vehemently denied by Ms. Corlew). However, nowhere has the 46th CTC pointed to any resolution of either Board of Commissioners delegating any such authority to their respective chairpersons (even asuming it were legal to do so).

It is a fundamental principle of Michigan jurisprudence that a municipal officer's act binds the municipality only if authorized by charter or resolution to do so, *Manning v City of Hazel Park*, 202 Mich App 685, 691 (1993), and that any person dealing with a municipal corporation is bound to take notice of the limits upon an officer's authority. *Johnson v City of*

Menominee, supra, 173 Mich App at 693-694; *Roxborough v Michigan Unemployment Compensation Comm'n, supra*, 309 Mich at 511. Also, parol agreements by municipalities are not recognized. *Horner, supra*.

Individual members of a county board of commissioners have no power to bind the municipality. *Rasch v City of East Lansing*, 141 Mich App 336, 345 (1985). Here, neither of the counties subsequently formally ratified the action of its respective chairperson, without which the act of the chair is not binding. *Droste v City of Highland Park*, 258 Mich 1, 3-4 (1932).

D. No amount of discussion or purported oral agreements can create a contract binding on a municipality

To the extent it may be suggested that various discussions and negotiations produced any form of oral agreement not reduced to writing and signed by the chairperson of each affected county pursuant to authority of each county Board of Commissioners, Michigan jurisprudence flatly refuses to recognize any parol agreement as binding upon a municipality. Public policy demands a written record to evidence all municipal matters. *Horner, supra*.

E. No contract could arise as to retiree health care absent compliance with MCL 38.1213

For any county to agree to create a retiree health care fund for public employees, it must adopt a resolution that designates a person to act as the fund's investment fiduciary, restrict withdrawals from the fund solely for payment of health care benefits for qualified persons, designate qualified persons, and determine whether the fund is to be established on an actuarial basis. MCL 38.1213.

Neither Crawford nor Kalkaska ever adopted a resolution conforming to these statutory requirements, so no valid contract could possibly arise as to retiree health care. Courts will not enforce, either in law or equity, a contract which violates a statute. Contracts which violate a statute are contrary to public policy and cannot be enforced by the courts, even though actual

injury does not result from the agreement. *Jaenicke v Davidson*, 290 Mich 298, 304 (1939), even if no harm results, *Federoff v Ewing*, 386 Mich 474, 480-481 (1971).

F. The invalidity of the contract claim undermines the "inherent powers" claim *pro tanto*

At oral argument in the Court of Appeals, Judge Zahra inquired of counsel for the 46th CTC as to the basis for the claim that the retiree health care and enhanced B-4 pension must be funded on the basis of "inherent powers", learning in response that the constitutionally requisite standard of "reasonable and necessary" could not be met but for the initial existence of a contract to provide such benefits (1661a-1662a):

> MR. KIENBAUM: * * * And assuming they have a certain level of obligation, what precludes them from contracting for something in addition.
>
> JUDGE ZAHRA: Well, if it's in addition to, then the inherent powers claim is out the window.
>
> MR. KIENBAUM: I don't think so.
>
> JUDGE ZAHRA: Because they only have the obligation to do that which is minimal. If you're telling me the contract is to go over and above that, then there cannot be, as a matter of law, an inherent power claim.
>
> MR. KIENBAUM: Let me put that in context. If you're starting from the get go, before the status quo gets changed, that would be correct. If you have a contract claim that my employees will get this and the employees give something up, then whether it is initially as an inherent powers claim or the inherent powers claim is buttressed by a legitimate contract claim, it certainly becomes reasonable and necessary. If I have a promise under these circumstances from the County to fund, and my employees gave something up, and assuming if nothing else was done in the abstract, these benefits would be in excess of the reasonable and necessary, once all of that happens, you've got a new scenario. You've got a context under which you have to examine whether, given all the things that happened and all that occurred under these circumstances, it is not reasonable and necessary to provide these benefits.
>
> And so I say to your Honor in response to that, this case is different than one where we start out with a proposal to do this, they say no, we then go to court and we say we want to force these two benefits, and I think under those circumstances, it would be a much tougher case for me. But when we go down the road where they promise and take the benefit of all this, and create the expectation on the part of the employees, this then becomes part of the reasonable and necessary under all the circumstances.

The 46th CTC thus "blithely assumed that any benefit once conferred is a contract and cannot be altered", which "is not and surely cannot be our law." *Studier, supra*, 472 Mich at 670.

In effect, counsel for the 46th CTC conceded (as *Hillsdale, supra*, compels) that the notion of "inherent powers" cannot be utilized to require initial or continued county funding of enhanced retiree health care and pension benefits in the absence of a contract creating such aggrandized expectations by judicial staff such that, in the event of subsequent reduction of benefits, "morale" would be "unconstitutionally" destroyed. Indeed, *Studier* makes clear that "morale" is not a valid consideration that can trump legislative prerogative (as a function of citizen self-government) to alter, amend, or abolish such benefits—if it were, then the plaintiffs in *Studier* would have been entitled to continuation of their original health care benefits.

G. To the extent not already spent *pendente lite* to provide the disputed benefits[56], any monies "bargained" for enhanced benefits may be recouped by the 46th CTC or its employees

As the facts reflect, there was never any actual "bargaining" between judicial employees and the counties—nor could there have been. *Judicial Attorneys Ass'n, supra*. If the 46th CTC, in violation of MCL 38.1213, put 0.5% of its employees' annual wage adjustment into a retiree health care fund, and such benefits were not actually expended *pendente lite*, insofar as Crawford and Kalkaska are concerned, the balance of the fund, to the extent attributable to employee "concessions", may be distributed among the employees. Likewise, longevity pay may be reinstated, as neither Crawford nor Kalkaska refused to appropriate funds for longevity for fiscal years 2001-2003.

[56] Any monies transferred to MERS to fund enhanced pensions can be recouped, either by having MERS refund anything beyond what was required to fund pre-existing pensions to the counties, or by having MERS credit such overpayments against future liability for the maintenance of pre-existing pensions. The only possible monies not recoverable would be any paid for retiree health care premiums, as insurance probably cannot be retroactively canceled (the insurer having been on the risk and thus having provided what it contracted to furnish).

H. Any "contract" between the 46th CTC and Crawford or Kalkaska was the product of a violation of MRPC 4.2 of which the 46th CTC may not properly take advantage

MRPC 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The Comment to MRPC 4.2 elaborates that the term "party" includes "persons having managerial responsibility on behalf of the organization." In either personally lobbying the Crawford and Kalkaska Boards to grant enhanced benefits, or sending his agents[57], such as Rudi Edel, to do so on his behalf, Judge Davis, who was well aware that both Crawford and Kalkaska had legal representation[58], did not have the permission of the counties' counsel to encourage either Board to take action to the legal prejudice of itself or its citizenry.

> The purpose of Rule 4.2 "is to prevent lawyers from taking advantage of uncounselled lay persons and to preserve the integrity of the lawyer-client relationship. See *United States v Batchelor*, 484 F Supp 812 (ED Pa, 1980) (societal interest that lay persons not make decisions of major legal import without advice of counsel); *Frey v Dept' of Health and Human Services*, 106 FRD 32 (ED NY, 1985) (noting courts and commentators have stated that provision is meant to prevent situations in which adverse counsel would take advantage of represented party) . . . see also G. C. Hazard, Jr. & W. W. Hodes, *The Law of Lawyering* 730 (2d ed. 1990) (prevents lawyer from taking advantage of lay person to secure admission against interests or achieve unconscionable settlement of dispute) . . . "

Annotated Model Rules of Professional Conduct (2nd ed., ABA, 1992), p. 424 (emphasis added). Enforcing any resulting "contract", to the prejudice of both the Crawford and Kalkaska Boards of Commissioners, and the residents of the counties whom they represent, would be unconscionable, and make a mockery of the prohibition of MRPC 4.2. The purported "contract"

---

[57] MRPC 8.4 and 5.4(c) prohibit a lawyer from circumventing Rule 4.2 through use of a third person. *In re Burrows*, 291 Or 135, 144; 629 P2d 820, 825; 22 ALR4th 906 (1981) (failure to obtain opposing counsel's consent not excused by delegating task to non-lawyers).

[58] Counties are either represented in civil matters by their prosecutors or by counsel employed for that purpose. MCL 49.72, 49.73, 49.153, and 49.155.

itself, if one otherwise exists, must be held unenforceable, by invoking the settled equitable principle that:

> In all the variety of the relations of life, in which confidence is reposed and accepted, and dominion may be exercised by one person over another, the court will interfere and relieve against contracts or conveyances when they would abstain from granting relief, if no particular relation existed between the parties, in which trust and confidence was reposed and accepted, and there was not an opportunity for an abuse of the confidence and the exercise of undue influence..

Beattie v Bower, 290 Mich 517, 528 (1939)

RELIEF REQUESTED

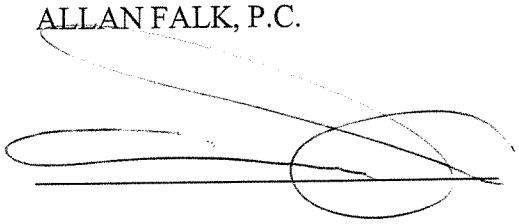
For each of the panoply of foregoing reasons, the judgments of the lower courts should be reversed, and the cause remanded with instructions to dismiss all claims by the 46th CTC with prejudice. In the cases being held in abeyance, all derivative awards of attorney fees for initiating and prosecuting an action as to which the original plaintiff 46th CTC had no standing to sue and which is factually and legally frivolous should be reversed and all attorney fee claims dismissed with prejudice, and all awards of sanctions against the counties or their counsel should also be reversed, without any need for remand, while the invaluable professional reputations of the public servants and eminent legal counsel who defended them herein should be restored by appropriate encomiums in the opinion that decides this case.

The Court is also respectfully urged to address itself to the problem of how to deter such vacuous lawsuits by the trial judiciary and how to protect funding authorities, and the taxpayers and citizens they serve, from the adverse consequences of successfully defending themselves, lest this inordinately expensive exercise in overreaching conduct by the 46th CTC be repeated by others. And sanctions for the cost of defending this lawsuit the 46th CTC lacked standing to

bring should be awarded in favor of Crawford and Kalkaska and against the 46th CTC's counsel[59].

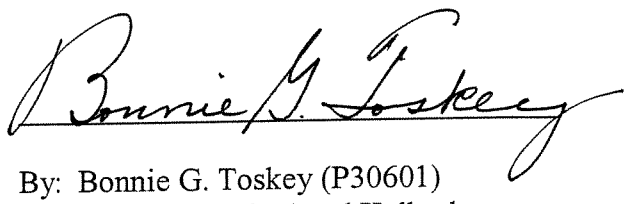
Respectfully submitted,

ALLAN FALK, P.C.



By: Allan Falk (P13278)
Lead Counsel for Crawford and Kalkaska
2010 Cimarron Dr.
Okemos, Michigan 48864
(517) 381-8449

COHL, STOKER, TOSKEY & MCGLINCHEY, P.C.



By: Bonnie G. Toskey (P30601)
Counsel for Crawford and Kalkaska
601 N. Capitol Ave.
Lansing, MI 48933
(517) 372-9000

Dated: February 15, 2006

[59] Sanctions against the 46th CTC itself would be circular—either the counties would have to appropriate additional funds to pay the sanctions, then reclaim those same funds, or a sanctions award of that magnitude would so deplete the 46th CTC's operational funding as to preclude enforcement.